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THE AIR FORCE LAW REVIEW



THE MASTER CLAIMS AND TORT LITIGATION LAWYER'S EDITION

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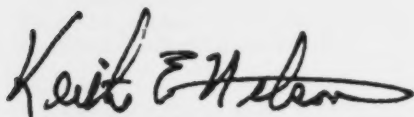
Foreword

The Master Claims and Tort Litigation Lawyer's Edition of *The Air Force Law Review* joins the three previous theme editions as an instant classic in its field. I am proud to add it to the judge advocate's arsenal of knowledge.

As with other Master Editions, this volume is targeted at base-level judge advocates and civilian attorneys "in the trenches," where real actions are taken that affect real people, every day. The articles focus on topics of importance, immediacy, and practicality. They were written by subject-matter experts who have gained their expertise by meeting and overcoming the same obstacles that face our lawyers at every base, worldwide. Each article contains valuable guidance on the most frequently encountered legal problems.

Virtually every base-level advocate deals with claims and tort issues, and does so often. I am confident that this volume of *The Air Force Law Review* will be of significant usefulness to this vast cadre of attorneys. No other topic demands such constant attention from so many military lawyers; it is a broad, multifaceted subject with many intricacies and potential pitfalls. Whether one is confronted with a major aircraft accident or a single instance of personal injury, each case is important to the Air Force and to the individuals involved. Much more than money is at stake; human well-being and confidence in the system also depend on fair, just resolution of claims and tort cases.

This edition should serve as a quick reference source for years to come. When a claims or tort question arises, it is very likely one of these articles will provide a head start on successful research and eliminate needless "re-invention of the wheel." These experts have been there; their work points the way toward speedy, accurate resolution of a host of persistent problems. While no substitute for the regulations, statutes, and cases, the Master Claims and Tort Litigation Lawyer's Edition is an indispensable guide and starting point for legal research. I commend it to the reading and study of all Air Force attorneys.



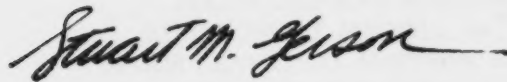
KEITHE E. NELSON
Major General, USAF
The Judge Advocate General

Preface

It is a commonplace that we have a litigious society, although various metaphors used to describe the impact of litigation are often confusing or erroneous. It is at least fair to say that large-scale tort cases now consume a significant percentage of available judicial resources, and their pervasiveness and complexity occasion both substantial delays in dispute resolution and high processing costs. Overarching these issues are questions relating to the size of awards, compensation for noneconomic loss such as pain and suffering, and enhancements for punitive damages.

At the same time as the actual and perceived impact of these real or threatened costs is hotly in debate, recent research casts significant doubt on the vitality of the traditionally accepted view of tort litigation as an impetus to the assurance of quality in medical treatment and product design. Amidst all this discussion and analysis, one can say dispassionately that American society has done much to encourage its citizens to demand a legal remedy for every sort of harm — actual or anticipated, tangible or intangible. This heretofore generally accepted expectation now is met by vigorous contradiction, in that expansive tort litigation has led, *inter alia*, to increased insurance premiums, escalating prices, the unavailability of products and services, and a weakening of our international competitive position.

In view of these significant issues, it is gratifying that *The Air Force Law Review* is devoting this entire edition to the subject of claims and tort litigation. The military faces virtually all of the challenges common to society in general, in addition to several unique problems. The dynamic interplay of military necessity and individual justice has spun a web of statutory, regulatory, and common law rules within which civil wrongs are redressed. Heretofore, advocates involved with these issues have had no single reference source to guide their actions. The Master Claims and Tort Litigation Lawyer's Edition should fill that need. The articles contained in this volume address, in a practical, "user-friendly" way, the recurring knotty difficulties that confront attorneys in the military context. The time spent reading these pages will prove to be a very wise investment for all who grapple with civil liability in the Armed Forces.



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The Feres Doctrine: Here Today — Gone Tomorrow?

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Although the FTCA provides jurisdiction over any claim founded on negligence brought against the U.S., the Feres doctrine immunizes the government from liability for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.¹

In the beginning, a person could not sue his government to collect monetary damages. This was called sovereign immunity; it stemmed from the notion that the "King can do no wrong."² In 1946, Congress changed that by introducing the Federal Tort Claims Act (FTCA).³ Under the FTCA, federal district courts have exclusive jurisdiction for claims against the United States for property damages, personal injury, or death arising from the negligence of government employees acting within their scope of employment. Claims filed under the FTCA are not tried by jury; they are tried before a federal judge. However, the claims are adjudicated under the tort law of the state where the alleged tort occurred.⁴

The FTCA opens the door to a variety of suits against the United States, including:

- (1) victims of government motor vehicle accidents can sue for the negligence of the driver;⁵
- (2) retired military members⁶ or military dependents can sue for malpractice of military doctors;⁷
- (3) federal prisoners can recover when negligently injured by government employees;⁸
- (4) suit can be brought when a ship runs aground because of negligent maintenance of a lighthouse;⁹ and

Colonel Hornbrook (B.A., Florida State University; M.A., University of Southern California; J.D., University of Florida) is Chief, Claims and Tort Litigation Staff, Office of The Judge Advocate General, Bolling Air Force Base, Washington, D.C. He is a member of the Florida State Bar.

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1. Atkinson v. United States, 825 F.2d 202 (9th Cir. 1987), substituted for opinion published at 804 F.2d 561 (9th Cir. 1986), modified, 813 F.2d 1006 (9th Cir. 1987).

2. See Parker, *The King Does No Wrong—Liability for Misadministration*, 5 VAND. L. REV. 167 (1952); Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 1 (1926).

3. 60 Stat. 842, codified at 28 U.S.C. §§ 1291, 1346, 1402, 2401, 2402, 2411, 2412, 2671-80 (1982).

4. The FTCA confers upon district courts

exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §§ 1346(b), 2402 (1982).

5. Swift v. United States, 866 F.2d 507 (1st Cir. 1989); Carter v. United States, No. 88-3179 (4th Cir. 1989) (unpublished); Lerma v. United States, No. 88-1744 (9th Cir. 1989) (unpublished).

6. United States v. Brown, 348 U.S. 110 (1954).

7. McNeill v. United States, 519 F. Supp. 283 (1981).

8. United States v. Muniz, 374 U.S. 150 (1963).

9. Indian Towing Co. v. United States, 350 U.S. 61 (1955).

(5) airline travellers can sue for damages or injuries caused by the negligence of FAA air traffic controllers.¹⁰

Conversely, the language of the FTCA denies suit in a number of areas, including: assault, battery, false arrest, libel, slander, misrepresentation, claims arising from activities in foreign countries, combatant activities in wartime, and discretionary acts or omissions.¹¹

Conspicuously, the FTCA contains no specific peacetime exclusion for military personnel.¹² Similarly, it fails to mention the phrase "incident to service." Yet, in 1950, the Supreme Court fashioned the *Feres* doctrine that prohibits active duty military members from successfully suing the Government if their injuries occur incident to service.¹³

The *Feres* doctrine, often presented as a motion to dismiss for lack of subject matter jurisdiction, is responsible for significant federal immunities, including:

(1) immunity from suit for damages when superior officers allegedly discriminate on the basis of race;¹⁴

(2) immunity when soldiers are secretly administered LSD as part of a government experiment;¹⁵

(3) immunity when military surgeons negligently injure their military patients;¹⁶

(4) immunity from veterans' suits for alleged "agent orange" injuries;¹⁷

(5) immunity when soldiers and their progeny are allegedly injured as a result of atomic radiation experiments;¹⁸ and

10. *United States v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir. 1955), *aff'd*, 350 U.S. 907 (1955).

11. 28 U.S.C. § 2680 (1982).

12. It is conspicuous because Congress considered a military exclusion, but decided against it. For example, all but two of the eighteen tort claims bills introduced in Congress between 1925 and 1935 contained clauses that retained governmental immunity from military torts. See *Brooks v. United States*, 337 U.S. 49, 51-52 (1949). The forerunner of the FTCA was H.R. 7236, introduced in the 76th Congress. This bill would have excluded recovery for "Any claim for which compensation is provided for by . . . World War Veterans' Act of 1924." The same bill, retitled H.R. 181, was introduced in the 79th Congress. Congress reconsidered the bill, struck out the Veterans exception, and enacted the remainder as the FTCA. It is also conspicuous because claims arising from combatant activities in wartime were specifically addressed and denied a cause of action, but military peacetime activities were not addressed. See Hitch, *The Federal Tort Claims Act and Military Personnel*, 8 RUTGERS L. REV. 316 (1954) for a complete summary of the FTCA legislative history.

13. The *Feres* doctrine originated in *Feres v. United States* 340 U.S. 135 (1950).

14. See *Chappell v. Wallace*, 462 U.S. 196 (1983). In *Chappell*, Navy enlisted men brought a *Bivens*-type race discrimination suit against superior officers. The Supreme Court applied the *Feres* rationale in holding that enlisted servicemembers may not sue superior officers to recover damages for constitutional violations. 462 U.S. at 304. The *Bivens* suit, from *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), ordinarily provides damages awards for constitutional violations. In *Bivens*, the Court held that a search and seizure that violates the fourth amendment may be actionable for damages even without statutory authorization for such relief. 403 U.S. at 398. However, the *Bivens* Court qualified its holding by stating "[t]he presented case involves no special factors counseling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396.

15. See *United States v. Stanley*, 483 U.S. 669 (1987). In *Stanley*, the Supreme Court barred a *Bivens* action on *Feres* grounds. Stanley, a former serviceman, had been secretly given LSD as part of a government experiment. After the experiment, he suffered from hallucinations, periods of incoherence, periods of memory loss, and severe personality disorders. He was discharged by the Army. Six years after his discharge, he received a letter from the Army asking for his cooperation in a study on the long-term effects of LSD. Only then did he become aware that he was the subject of an experiment. In deciding against Stanley, the Court found that the *Feres* doctrine controls when soldiers bring *Bivens* constitutional suits.

16. *Feres v. United States*, 340 U.S. 135 (1950).

17. See *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 194 (2d Cir. 1987).

18. *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981) (en banc), *cert. denied*, 456 U.S. 972 (1982).

(6) immunity from cross-claims brought by private companies when they are sued by military personnel.¹⁹

This article will discuss the Feres doctrine, providing a brief history, exploring arguments for changing or retaining it, and examining recent legislative activity proposing its modification.

I. HISTORY OF THE FERES DOCTRINE

Three years after passage of the FTCA, *Brooks v. United States*²⁰ raised the issue of whether military members may sue the Government. Brooks, a soldier, sued the Government for injuries sustain in an automobile accident. While he was off base and on furlough, an Army truck struck his car. The Court permitted Brooks to sue the Government for the truck driver's negligence and ruled the FTCA does not exclude all claims of military members.²¹ However, the Court stated that "a wholly different case would be presented" if the injury had occurred incident to service.²² The Court further cautioned that despite the "literal language" of the FTCA, recovery for incident-to-service claims might be barred because the results might be "outlandish."²³ The Court did not wait long before it was presented with that "wholly different case."

In *Feres v. United States*,²⁴ cases from three circuits were combined to resolve the issue: *Feres v. United States*,²⁵ *Jefferson v. United States*,²⁶ and *Griggs v. United States*.²⁷ In *Feres*, the widow of Lieutenant Rudolph Feres alleged negligence of Lieutenant Feres' superiors for quartering him in barracks that burned due to a defective heating system. Lieutenant Feres was killed in the fire. In *Jefferson*, the plaintiff alleged malpractice after an Army surgeon left an eighteen-by-thirty-inch towel inside his stomach during the course of an operation. *Griggs* alleged that medical malpractice of Army surgeons caused a wrongful death. The Supreme Court unanimously held that the Government is not liable for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."²⁸

In deciding against their claims, the *Feres* Court advanced three main arguments. First was the statutory requirement for parallel private liability. Under the FTCA, the Government is held liable "if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."²⁹ Because

In *Jaffee*, a former soldier and his wife sued the Government and government officials for radiation injuries cause by exposure to nuclear explosions during a military experiment. The court found the experiment to be incident to service and effectively immunized individual federal officials from tort liability to servicemembers for actions taken in the course of their official duties, whether or not the tortfeasors are within the "chain of command." 663 F.2d at 1228, 1234. See also *Hinkie v. United States*, 715 F.2d 96 (3d Cir. 1983); *Mondelli v. United States*, 711 F.2d 567 (3d Cir. 1983).

19. See *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977). In *Stencel*, a National Guard pilot was injured during ejection and sued Stencel, the manufacturer of the ejection system. Stencel, in turn, brought a third-party action against the United States alleging that any malfunction in the system was due to faulty government specifications, requirements, or components. The Court utilized *Feres* arguments and found the Government immune to Stencel's claims. 431 U.S. at 673, 674. See also *Carter v. City of Cheyenne*, 649 F.2d 827 (10th Cir. 1981), (City of Cheyenne denied indemnity from the United States as a third-party defendant).

20. 337 U.S. 49 (1949).

21. *Id.* at 51.

22. *Id.* at 52.

23. *Id.* at 53.

24. 340 U.S. 135 (1950).

25. 177 F.2d 535 (2d Cir. 1949).

26. 178 F.2d 518 (4th Cir. 1949).

27. 178 F.2d 1 (10th Cir. 1949).

28. *Feres v. United States*, 340 U.S., 135, 146 (1950).

29. 28 U.S.C. § 1346(b) (1982).

private individuals do not build armies or exercise command authority over soldiers, the Court decided that "like circumstances" did not exist. During subsequent cases refining the *Feres* doctrine, this argument has fallen from favor.³⁰

Developing the second argument, the Court pointed to the existence of a simple, certain, and uniform compensation system and theorized that Congress intended Veterans Administration (VA) benefits to be the exclusive remedy for military injuries.³¹ The Court reasoned that if Congress had planned for tort recovery as well as VA benefits, then Congress should have provided for an adjustment of tort recovery against VA benefits so that soldiers would not be compensated twice for the same injury.³² Over the years, the Supreme Court has occasionally frowned upon this argument;³³ however, it currently holds a position of respect.³⁴

The Court's third argument rested on the language of the FTCA calling for local state tort law to control government liability.³⁵ The Court posited that the FTCA would be unfair to service members if they were subject to varying state laws when they have no control over where they are stationed.³⁶ Supporting this argument, the Court noted that the relationship between the Government and service members is "distinctively federal in character." Therefore, the Federal Government, rather than state tort law, should dictate the "scope, nature, legal incidents and consequences" of that relationship.³⁷ As with the VA/exclusive remedy argument, the Supreme Court has eroded this rationale since the *Feres* decision,³⁸ but recently it received new vitality.³⁹

Finally, the Court distinguished *Feres* from *Brooks* by noting that the injury to Brooks did not arise in the course of military duty. In that Brooks was off base and on furlough, his actions were not incident to service, and, therefore, he could recover under the FTCA.⁴⁰ On the other hand, the three claimants in *Feres* were on duty.

30. See *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

In *Indian Towing*, the Court held that relief could be granted for the Coast Guard's negligent failure to repair a lighthouse even though private citizens do not build and operate lighthouses. See also *Rayonier v. United States*, 352 U.S. 315 (1957). Two years after *Indian Towing*, the *Rayonier* Court allowed relief when government fire fighters failed to exercise due care in fighting a fire. The Court specifically dismissed the private liability defense and stated that the purpose of the FTCA was "to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented government liability." 352 U.S. at 319. See also *United States v. Muniz*, 374 U.S. 150 (1963).

31. *Feres v. United States*, 340 U.S. 135, 144 (1950).

32. *Id.*

33. See *United States v. Brown*, 348 U.S. 110 (1954). In *Brown*, the Supreme Court held that receipt of VA disability payments does not preclude recovery under the FTCA and that Congress did not make the veterans' compensation system an exclusive remedy. 348 U.S. at 111, 113. See also *United States v. Shearer*, 473 U.S. 52 (1985). In *Shearer*, the Supreme Court stated in footnote four that the varying state tort law factor and the exclusive VA benefits factor no longer control. 473 U.S. at 58. Also, note that the Supreme Court in *Feres* seemingly forgot the *Brooks* decision where eligibility for VA benefits had no effect on the potential for suit under the FTCA. The Court in *Brooks* stated that statutory compensation programs "indicate no purpose to forbid tort actions under the Tort Claims Act." 337 U.S. at 53. The Court did, however, indicate that FTCA recovery should be "taken into consideration, when the serviceman obtains judgment under the Tort Claims Act." 337 U.S. at 53.

34. See *United States v. Johnson*, 481 U.S. 681, 688-90 (1987).

35. 28 U.S.C. § 1346(b).

36. *Feres*, 340 U.S. 135, 142-43 (1950).

37. *Id.* at 143-44.

38. See *United States v. Muniz*, 374 U.S. 150 (1963). In *Muniz*, federal prisoners sued the Government for injuries resulting from the negligence of government employees. The Supreme Court permitted the suit and found that the effect of variations between states is more a matter of conjecture than reality. The Court pointed out that prejudice to the prisoners stemming from nonuniformity of tort law will not be improved by removing their right to sue. Also note that the Court seemingly forgot the *Brooks* decision where Brooks was permitted to bring suit under state law.

39. *United States v. Johnson*, 481 U.S. at 681, 689-90 (1987).

40. 340 U.S. at 146 (1950).

Therefore, their injuries occurred incident to service, and they could not recover under FTCA.⁴¹ This "incident to service" test has become one of the standards for deciding FTCA military claims.

Four years later, in *United States v. Brown*,⁴² the Court introduced a new rationale for the Feres decision. In *Brown*, a veteran sought damages for malpractice in a VA hospital. In reaffirming the *Brooks* case, the Court permitted suit and held that VA payments and FTCA recovery are not mutually exclusive.⁴³ Though seemingly weakening the Feres doctrine by rejecting the VA/exclusive remedy argument, the Court simultaneously rejuvenated *Feres* by introducing the military discipline argument. The *Brown* Court expanded the *Feres* decisions as follows:

The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character.⁴⁴

Since the *Brown* decision, the military discipline argument has occupied an important, if not the foremost, position in sustaining the Feres doctrine.⁴⁵ The need to preserve military discipline, standing alone, can justify dismissal of suits arising out of activities incident to military service even when there was no command relationship between the claimant and the individual tortfeasor.⁴⁶ On occasion, the military-discipline test has even displaced the incident-to-service test. For example, thirty-one years after *Brown*, in *United States v. Shearer*,⁴⁷ the Supreme Court found that the effect on military discipline and the potential for judicial second-guessing of military decisions are more important than the location of the incident or the duty status of the victim. In *Shearer*, an Army private was on leave and off base (in another state) when he was murdered by another serviceman. The claimant alleged Army negligence for failing reasonably to control the assailant who had murdered previously. The Supreme Court denied recovery and ruled that applicability of Feres depends not so much on the location of the incident or the duty status of the victim, but rather on "whether the suit requires the civilian court to second-guess military decision, and whether the suit might impair essential military discipline."⁴⁸ Thus, the Feres doctrine may bar recovery even when the incident occurs off base and the soldier is on leave. Query whether the *Brooks* result would be the same today?

The *Shearer* decision seemingly displaced the incident-to-service test with inquiry into whether military discipline is jeopardized, or whether the judiciary must second-guess military decisions. Breaking further with conventional Feres analysis, the Court declared that the tort/uniformity and the VA/exclusive remedy arguments no longer control.⁴⁹ However, the Court soon found occasion to reevaluate its *Shearer* decision.

41. *Id.* at 138.

42. 348 U.S. 110 (1954).

43. *Id.* at 111-13.

44. *Id.* at 112.

45. See *Muniz*, 374 U.S. 150 (1963). In *Muniz*, the military-discipline argument was called the best explanation for Feres. 374 U.S. at 162. See also *United States v. Stanley*, 483 U.S. 669, 680-84 (1987); *Johnson v. United States*, 704 F.2d 1431 (9th Cir. 1983); *Chappell v. Wallace*, 462 U.S. 296 (1983); *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977); *Parker v. Levy*, 417 U.S. 733, 743-44 (1974); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *Dalehite v. United States*, 346 U.S. 15 (1953).

46. *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981).

47. 473 U.S. 52 (1985).

48. *Id.* at 57, 58.

49. *Id.* 4 at 58, n.4.

Perhaps because of the confusion that arose in lower courts when *Shearer* removed the incident-to-service test, the Court in *United States v. Johnson*⁵⁰ brought back the incident-to-service test, as well as both the tort/uniformity and the VA/exclusive remedy arguments.⁵¹ In *Johnson*, a Coast Guard pilot died when his helicopter crashed into the side of a mountain. The personal representative of Johnson's estate sued the Government, alleging negligence of civilian FAA air traffic controllers.

The Court of Appeals for the Eleventh Circuit permitted suit, finding that Johnson's claim did not implicate the critical values of military discipline or second-guessing military decisions. Reversing in a five to four decision, the Supreme Court restored the vitality of the incident-to-service test and ruled that the civilian status of the tortfeasor is irrelevant to the *Feres* doctrine.⁵² Justice Scalia's stinging dissent in *Johnson* suggested that the Court should never have taken the liberty of creating the *Feres* doctrine in the first place and certainly should not extend it by denying recovery to those injured by civilian government personnel.⁵³ Said Scalia, "In sum, neither the three original *Feres* reasons nor the post hoc rationalization of 'military discipline' justifies our failure to apply the FTCA as written. *Feres* was wrongly decided and heartily deserved the 'widespread, almost universal criticism' it has received."⁵⁴

In retrospect, the Supreme Court created the *Feres* doctrine by formulating the incident-to-service test to determine whether military personnel may sue under the FTCA. This came to mean early on that servicemen could sue for government negligence only if their injuries occurred while they were off base and on leave, that is, not acting in furtherance of military duty.⁵⁵ As the original arguments for *Feres* faded, the military-discipline argument rose to take its place and occasionally replaced the incident-to-service test.⁵⁶ However, federal courts have recently decided in favor of reverting to the incident-to-service test fortified with the caveat that any case impinging on military-discipline values will also be considered incident to service.⁵⁷

II. THE INCIDENT-TO-SERVICE TEST

With the unequivocal return to the incident-to-service test in the *Johnson* case, the question of whether an action is incident to service is of crucial importance. Unfortunately, the Supreme Court has failed to provide a clear definition of incident to service as indicated by the following excerpt from the 1985 *Shearer* case:

The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases. Here, the Court of

50. 481 U.S. 681 (1987).

51. *Id.* at 689-90.

52. *Id.* at 686.

53. *Id.* at 703.

54. *Id.* at 700 (citing *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1246 (E.D.N.Y., 1984), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984)).

55. *Brooks v. United States*, 337 U.S. 49 (1949).

56. *United States v. Brown*, 348 U.S. 110 (1954); *United States v. Muniz*, 374 U.S. 150 (1963); *Hunt v. United States*, 636 F.2d 580, 599 (D.C. Cir. 1980) ("The protection of military discipline . . . serves largely if not exclusively as the predicate for the *Feres* doctrine. . . . Only this factor can truly explain the *Feres* doctrine and the crucial line it draws.") *In Johnson v. United States*, 704 F.2d 1431 (9th Cir. 1983), the court concluded that "the most persuasive justification for the *Feres* doctrine is the potential impact of civil suits on military discipline." See also *United States v. Shearer*, 473 U.S. 52 (1985).

57. *United States v. Johnson*, 481 U.S. 681 (1987); *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1978). See also *Uptegrove v. United States*, 600 F.2d 1248 (9th Cir. 1979). *Uptegrove* involved the death of a Navy lieutenant flying space available on an Air Force C-141 from Japan to Seattle, Washington. The C-141 crashed into a mountain due to incorrect information given by the FAA Air

Appeals placed great weight on the fact that Private Shearer was off duty and away from the base when he was murdered. But the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions, and whether the suit might impair essential military discipline.⁵⁸

However, in 1987, in *United States v. Stanley*, the court found that the incident-to-service test "provides a line that is relatively clear," and regarding that test, stated:

Where one locates the rule along this spectrum depends upon how prophylactic one thinks the prohibition should be (i.e., how much occasional, unintended impairment of military discipline one is willing to tolerate), which in turn depends upon how harmful and inappropriate judicial intrusion upon military discipline is thought to be.⁵⁹

In a more recent Eleventh Circuit case, *Pierce v. United States*,⁶⁰ the court looked at a rather straightforward fact pattern and gave another incident-to-service solution. Plaintiff, an active duty Army man, was given permission by his boss to leave the installation to take care of personal business. He was injured shortly thereafter off base when he was struck by a Navy recruiter who was negligently driving a government vehicle. In reversing the district court which had found that Feres barred the action, the court said that the Eleventh Circuit had adopted a three-part test for determining whether a person is acting incident to service.

The factors to be considered include (1) the duty status of the servicemember, (2) the place where the injury occurred, and (3) the activity the serviceman was engaged in at the time of injury. After evaluating the relative weight of these factors, a court should determine whether an activity is incident to service based on the totality of the circumstances.

Based upon the totality of the circumstances, we conclude that the district court erred in ruling that Pierce's injuries were incurred from activities 'incident to service.' Pierce was on pass, the accident occurred off the base, and the activities involved were not proximately related to military service.⁶¹

The court also found that plaintiff's claim posed no threat to "the military disciplinary structure."⁶²

Incident-to-service analysis varies among the districts; however, some generalizations can be made from a review of Supreme Court and lower court cases. Exceptions to the following rules abound, but for the most part, the incident-to-service test seems to mean that:

- (1) Servicemembers probably cannot recover from the Government if they are injured on base or in a military aircraft, vessel, or vehicle.⁶³

Traffic Controller. Citing *Archer v. United States*, 217 F.2d 548 (9th Cir. 1954), which involve the death of a Military Academy cadet flying space available, the court noted: "Here, as in *Archer*, Uptegrove was subject to military discipline while he was on the C-141. Under *Archer*, the fact that he was on leave and voluntarily boarded the transport does not alter the fact that the activity was incident to his military service."

58. *Shearer*, 473 U.S. 52 (1985). In *Shearer*, the respondent alleged that, although the Army knew that the other serviceman was dangerous, it, "negligently and carelessly failed to exert a reasonably sufficient control over" him, "failed to warn other persons he was at large, [and] negligently and carelessly failed to . . . remove [him] from active military duty." In reversing the court of appeals, the Supreme Court applied both the assault and battery exception of the FTCA (28 U.S.C. § 2680(h)) and the Feres doctrine, noting that the failure to control and failure to warn allegations "[go] directly to the 'management' of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman." *Id.* at 58.

59. *United States v. Stanley*, 483 U.S. 669, 681. (1987).

60. *Pierce v. United States*, 813 F.2d 349 (11th Cir. 1987). See also *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980).

61. *Id.* at 354.

62. *Id.*

63. See *Feres*, 340 U.S. 135 (1950); *Uptegrove v. United States*, 600 F.2d 1248 (1979); Thomason

- (2) Servicemembers probably cannot recover from the Government unless they are on leave or furlough.⁶⁴
- (3) Servicemembers cannot recover from the Government if they are performing a military duty.⁶⁵
- (4) Servicemembers cannot recover from the Government if they are acting under orders or subject to military discipline.⁶⁶
- (5) Servicemembers cannot recover from the Government if the trial might involve second-guessing military decisions or otherwise impair military effectiveness.⁶⁷
- (6) Military dependents can recover for direct injuries.⁶⁸
- (7) Military dependents may or may not recover for indirect injuries, e.g., birth defects caused by injury to the military member or hardship caused by the death of a military member.⁶⁹
- (8) Veterans can recover for injuries occurring after discharge from the military.⁷⁰

III. SHOULD THE FERES DOCTRINE BE CHANGED?

Rather than becoming embroiled in a statutory interpretation contest to decide whether the Supreme Court correctly decided the *Feres* case,⁷¹ this section of the article focuses on the effects of the Feres doctrine, including the impact on military effectiveness, equity, the potential to deter negligent behavior, and costs.

v. Sanchez, 398 F. Supp. 500 (D.N.J. 1975), *aff'd*, 539 F.2d 955 (3d Cir. 1976), *cert. denied*, 429 U.S. 1072 (1977). *But see* Parker v. United States, 611 F.2d 1007 (5th Cir. 1980). Decedent was on furlough and killed on base by negligently driven military vehicle. Held: non-Feres barred; *see also* Downes v. United States, 249 F.Supp., 626 (E.D.N.C. 1965). Claimant was on pass and injured on base by negligently driven military truck. District Court ruled injuries were not incident to service and he could maintain suit under FTCA.

64. *See Brooks*, 337 U.S. 49 (1949); *Adams v. United States* 728 F.2d 736 (5th Cir. 1984). Decedent was on indefinite excess leave after court-martial sentence. Court held Feres doctrine not applicable; *Hass v. United States*, 518 F.2d 1138 (4th Cir. 1975); *Henniger v. United States*, 473 F.2d 814 (9th Cir. 1973); *Parker*, 611 F.2d 1007 (5th Cir. 1980); *Downs*, 249 F. Supp., 626 (E.D.N.C. 1965). *See also Madsen v. United States*, 841 F.2d 1011 (10th Cir. 1987). An Air Force captain was on terminal leave anticipating his military retirement when he was admitted to Army medical center for treatment of injuries sustained in motorcycle accident and placed on medical hold status upon his admission with his retirement delayed. The court told he was barred under the Feres doctrine from suing the United States for alleged medical malpractice during his hospitalization. *See also Harvey v. United States*, No. 88-4222 (5th Cir. Oct. 3, 1989), where the member was on medical hold for disability processing; the court held the Feres doctrine did not bar a claim for alleged medical malpractice in military facility.

65. *See Johnson*, 481 U.S. 681 (1987).

66. *See* 340 U.S. 135 (1950); *Uptegrove*, 600 F.2d 1248 (9th Cir. 1979).

67. *See Stanley*, 483 U.S. 669 (1987); *Shearer*, 473 U.S. 52 (1985); *Chappell*, 462 U.S. 296 (1983).

68. *Reilly v. United States*, 665 F. Supp. 976 (D.R.I. 1987); *McNeill v. United States*, 519 F. Supp. 283 (D.S.C. 1981).

69. *Monaco v. United States*, 661 F.2d 129 (9th Cir 1981); *Hinkie v. United States*, 715 F.2d 96 (3d Cir. 1983); *Mondelli v. United States*, 711 F.2d 567 (3d Cir. 1983); *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987); *Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1982). *See also Note, Pushing The Feres Doctrine A Generation Too Far: Recovery For Genetic Damage To The Children of Servicemembers*, 32, AM. U.L. REV. 1039 (1983); *Cohen-Klein & Berkower, Atomic Veterans*, 6 CARDOZO L. REV. 391 (1984).

70. *See United States v. Brown*, 348 U.S. 110 (1954); *In re: "Agent Orange: Product Liability Litigation"*, 818 F.2d 194 (2d Cir. 1987); *Martinez v. Schrock*, 537 F.2d 765 (3d Cir. 1976).

71. The Court's creation of the Feres doctrine has met much criticism. *See Monaco v. United States*, 661 F.2d 129, 132 (9th Cir. 1981); *Parker v. United States*, 611 F.2d 1007, 1010-11 (5th Cir. 1980). *Note, From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH.

A. Impact on Military Effectiveness

For critics of the Feres doctrine, this has been the most difficult argument. Since the *Brown* decision, the Court has referred repeatedly to the military-discipline argument as the best justification for the Feres doctrine.⁷² The 1987 *Stanley* court found that:

A test for liability that depends on the extent to which particular suits would call into question military discipline and decision making would itself require judicial inquiry into, and hence intrusion upon, military matters. Whether a case implicates those concerns would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside the risk of erroneous judicial conclusions (which would becloud military decisionmaking), the mere process of arriving at correct conclusions would disrupt the military regime.⁷³

In the 1983 *Chappell* case, the Court not only admitted it was incompetence in military matters, but expressed an almost mystical regard for military discipline:

Centuries of experience have developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment.⁷⁴

Because of its importance to our national security, deterioration of military discipline is a major concern; however, it is also difficult to measure and next to impossible to compute in advance. On one end of the spectrum, Feres can be rationalized because permitting soldiers to make claims against battlefield commanders for "negligently" employing "unsound" tactics could create hesitant commanders and argumentative soldiers. On the other end of the spectrum, Feres may be difficult to explain because it

L. REV. 1099 (1979), "The Feres exemption to the FTCA is unnecessary. It deprives military personnel of redress for harms in the name of policies that are more than adequately fulfilled by the FTCA's 'discretionary function' exception" at 1102, and "Feres has placed an undesirable and inequitable disability upon members of the armed services. That burden is inconsistent with modern law and policy regarding the legal status of military personnel" at 1126; *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242 (E.D.N.Y. 1984); *Scales v. United States*, 685 F.2d 970 (5th Cir. 1982), *cert. denied*, 460 U.S.1082 (1983); see Cyze, *The Federal Tort Claims Act: A Cause of Action for Servicemen*, 14 VAL. U.L. REV. 527 (1980); Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A. F. L. REV. 24 (1976); Peluso v. United States, 474 F.2d, 605 (3d Cir. 1973), *cert. denied*, 414 U.S. 879 (1973); Thomason v. Sanchez, 398 F.Supp. 500 (D.N.J. 1975); *United States v. Johnson*, 481 U.S. 681, 700 (1987), Scalia, J. dissenting; Bauman, *The Feres Wheel Keeps Turning-Extending Feres to Civil Rights Actions in The Military*, 18 CREIGHTON L. REV. 1055 (1985). But see Bernott, *Fairness and Feres: A Critique of The Presumption of Injustice*, 44 WASH. & LEE L. REV. 51 at 70 (1987), where the author concludes that Feres should not be changed because "Servicemen already enjoy greater access to federal relief for most injury than do all other federal employees; equity does not compel exacerbating this disparity by revoking or limiting Feres." See also Note, *In Support Of The Feres Doctrine and A Better Definition of "Incident to Service"*, 56 ST. JOHN'S L. REV. 485 (1982); see also Comments, *Why Congress Should Not Legislatively Repeal The Feres Doctrine-A Struggle In Equity*, 18 TEXAS TECH. L. REV. 819,850 (1987), where it is suggested that the Veterans Benefit Act be revamped to ensure adequate compensation is provided to active duty victims of medical malpractice and the quality assurance program be revamped, at 850. For an interesting attack on the dissent in *Johnson*, see Bernott, *United States v. Johnson: The Dissent's Flawed Attack on Feres v. United States*, 21 CREIGHTON L. REV. 109 (1987).

72. See *Shearer*, 473 U.S. 52 (1985); *Chappell*, 462 U.S. 296 (1983); *Muniz*, 374 U.S. 150 (1963); *Johnson*, 451 U.S. 681 (1987).

73. 483 U.S. at 682-83 (1987).

74. 462 U.S. at 300-01 (1983).

may not be clear how discipline will deteriorate if tank drivers are permitted to recover for medical malpractice occurring while they are unconscious in the operating room.

However, supporters of the Feres doctrine argue that even where only medical malpractice is involved, scenarios could arise where the court system could be misused at the expense of military-discipline. A recent House Report furnishes the following examples:

(a) A pilot is ordered removed from flight status because of medical condition diagnosed by a flight surgeon. The pilot (whose career and therefore livelihood are in jeopardy), instead of following his orders, attempts to circumvent those orders through a malpractice suit alleging that the diagnosis was improper.

(b) A commander denies a security clearance to a soldier based upon a mental health examination. The soldier brings suit alleging misdiagnosis and resulting mental anguish.

(c) A servicemember in an overseas command is scheduled for surgery. He demands that it be performed in the United States. (Recent proposed legislation would amend the Federal Tort Claims Act authorizing suit if the malpractice occurs in the United States.) Does the commanding officer send this individual back? Does he medically discharge him? Does he allow the servicemember to make the decision or barter for the choice? Does he court-martial him for disobeying the order to go to the hospital? At issue here is the authority of the commanding officer. The knowledge that such authority was challenged takes no time at all to spread throughout the unit, and that is what serves to undermine the good order and discipline, as well as the cohesiveness, of the unit.⁷⁵

On the other hand, opponents of Feres argue that military personnel can now sue for malpractice on behalf of dependents with no apparent breakdown in military discipline; that there is no reason to believe that bringing suit on their own behalf will undermine military discipline.⁷⁶ Representative Frank of Massachusetts (while moving for passage of a recent bill to modify the Feres doctrine, allowing servicemembers a cause of action for medical malpractice) provided the following critique of the military discipline argument:

The one argument we have heard against this is that it would be subversive of discipline because enlisted personnel would be allowed to sue officers. I do not favor giving a private or a sergeant the right to defy an order from a captain, but . . . if after emerging from an anesthetic and being diagnosed as having been the victim of malpractice, a private is allowed in an orderly process to bring a lawsuit against the captain or major who performed the operation, I do not for the life of me see how discipline is undermined.

If the argument is that the enlisted personnel will somehow infer that their officers are not infallible, I say to those who worry about it, "It is too late. They already know that."

There is no right here for any enlisted personnel to defy a superior officer, to confront a superior officer in an unbecoming manner. It simply allows this legal process.⁷⁷

In addition to the effects on discipline and military decisionmaking, it is alleged that repealing the Feres doctrine would degrade military effectiveness to the extent that litigants are absent from their duties and to the extent that the military would be forced to expend funds to provide transportation and litigation support to its members being sued. Of course, in the case of medical malpractice, military doctors already must participate in suits brought by military dependents and veterans; allowing active duty

75. H.R. REP. NO. 87, 101st Cong., 1st Sess. 25 (1989).

76. H.R. REP. NO. 87, 101st Cong., 1st Sess. 4 (1989).

77. 135 CONG. REC. H3225 (daily ed. June 27, 1989) (statement of Rep. Frank).

military claims will only tend to increase the number of suits and payments.⁷⁸

Finally, morale of the troops may be affected by repealing *Feres*. Those in favor of the *Feres* doctrine argue that permitting soldiers to sue their comrades-in-arms will diminish morale.⁷⁹ Additionally, abolishing *Feres* would splinter military cohesion by creating a privileged class of claimants who could bring suit, and an underprivileged class who would still be barred by the combat, foreign country, and discretionary function exceptions.⁸⁰ On the other hand, those opposed to *Feres* argue that providing military personnel with the same rights as civilians will enhance morale by eliminating their second-class-citizen status.⁸¹

As can be seen, the military effectiveness issue embodies an assortment of concerns: the crucial importance of military effectiveness to national security; the risk to military effectiveness posed by judicial interference; the potential danger to military discipline posed by the litigation process; the difficulty of measuring when and how much military discipline is deteriorating; and the difficulty of designing a bright line rule to protect the interests of both national security and individual soldiers.⁸²

B. Equity

Equity concerns have generated the strongest opposition to the *Feres* doctrine. Because they cannot bring suit, although even federal prisoners can,⁸³ military personnel are sometimes referred to as second-class citizens. However, the other side of the issue is that federal prisoners do not have an alternate remedy to the tort process, whereas military personnel have VA benefits.⁸⁴

The Supreme Court in *Feres* pointed out that VA benefits "provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services."⁸⁵ While VA benefits do not create millionaires as civil litigation occasionally

78. See *Hearing on S. 2490 Before Subcomm. on Courts and Administrative Practice, Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. (June 17, 1988) (statement by Ms. Buck, DOD General Counsel):

In late 1985, the Congressional Budget Office (CBO) estimated that passage of similar legislation (removing the *Feres* bar in medical malpractice cases) would result in additional claims payments of \$25 million. That figure was arrived at in the following manner: Approximately \$50 million in malpractice claims was paid by the military in 1984. Those payments were made to civilians eligible for medical care in military facilities, i.e., dependents and retirees. Those civilians represented two-thirds of the patient population serviced by military hospitals; the other one-third were military personnel barred by *Feres* from filing malpractice claims. By applying a straight-line extrapolation, the CBO figured that military patients, if allowed to file claims, would generate 50% more in payments or \$25 million. Based upon FTCA payouts over the past three years and using the same methodology employed by the CBO, DOD estimates that passage of the proposed legislation will cost approximately \$30.5 million per year.

79. H.R. REP. No. 87, 101st Cong., 1st Sess. 18 (1989).

80. H.R. REP. No. 87, 101st Cong., 1st Sess. 26 (1989).

81. H.R. REP. No. 87, 101st Cong., 1st Sess. 4 (1989).

82. *But see* Rhodes who asserts,

Even in a losing cause, litigation involves allegations of negligent activity on the part of military members. Although the mere existence of adversary proceedings can often cause ill will, there is no evidence that negligence actions by service members over the past twenty-five years have degraded the military mission.

Rhodes, *supra*, note 71, at 42.

83. 374 U.S. 150 (1963).

84. Veterans' Benefits Act, 38 U.S.C. §§301-1008.

85. *Muniz*, 340 U.S. 5 at 144 (1950). See also, *Hatzlack Supply Inc., v. United States*, 444 U.S. 460, 464 (1980). "Congress must have intended the Veterans' Benefits Act to be the sole remedy, wherein a servicemember can be eligible for 'simple, certain and uniform compensation' for service-related injuries, regardless of fault."

does, VA benefits are easier to qualify for; they do not require proof of negligence (in fact, are awarded even for accidentally shooting oneself in the foot while off base and on leave); they are not determined by the relative skill of claimant's attorney; and they are not consumed by attorney's fees. In the sometimes ultrahazardous business of soldiering, equity may require that soldiers be adequately compensated irrespective of these considerations.

The value of VA benefits has been disparaged⁸⁶ and the solution, according to the opponents of the Feres doctrine, is to abolish the Feres doctrine or at least modify it so that a subset of the military can recover under the FTCA. Those favoring the Feres doctrine, argue that if VA benefits are too low, VA benefits should be increased so that all military personnel are treated more fairly.⁸⁷ Furthermore, modifying Feres would permit a limited number of servicemembers to sue while those injured overseas, or injured in combat, or under a discretionary function would still be barred. This would create as much inequity as it cures.

A Department of Justice statement in a recent House Report⁸⁸ described various benefits available to servicemembers:

The present statutory compensation scheme has three discrete components. First, members of the uniformed services serving on active duty receive free medical care when injured or ill. See, e.g., 10 U.S.C. §§3721, 6201, and 8721. They also receive unlimited sick leave with pay and allowances until well or released from active duty. Survivors of service members are entitled to death gratuity benefits which include six months of base pay (up to a maximum of \$3,000.00) (10 U.S.C. §§1475-1478), as well as unique, subsidized insurance or insurance-type plans, 10 U.S.C. §1447 (Survivors Benefit Plan); 38 U.S.C. §§765, et seq.; 38 U.S.C. §§765, et seq. (Servicemen's Group Life Insurance).

Second, Congress has established a comprehensive disability retirement system for service members permanently injured in the line of duty. See 10 U.S.C. §§1201 and 1401. Moreover, should a service member leave the service without seeking disability retirement, he may later request it. For example, section 1552 of Title 10, United States Code, provides that the Secretaries of the Services, acting through their Boards for the Correction of Military Records (BCMRs), may correct any military record when they consider it necessary to correct an error or remove an injustice. This authority has often been used to provide former service members who demonstrate that they suffer from a permanent disability as a result of a service-related injury, with a retroactive, permanent disability retirement annuity and even back pay. See 32 C.F.R. §581.3(b) (2) (1987).

Third, the Veterans' Benefits Act provides yet another system of medical care, disability and death benefits for the service-disabled veteran and his family. (A veteran eligible for both veterans' disability benefits and military disability retirement benefits must choose which he will receive.)⁸⁹

While VA benefits pale next to multimillion dollar judgments, the military benefits system compares favorably to other benefits programs, according to a recent study.⁹⁰ The 1985 study

86. See Note, *A Critique of the Veterans Administration Claims Process*, 52 BROOKLYN L. REV. 533, 550 (1986); Note, *Radiation Injury and the Atomic Veteran: Shifting the Burden of Proof on Factual Causation*, 32 HASTINGS L.J. 933, 957 (1981); Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099, 1106-08 (1979).

87. H.R. REP. No. 86, 101st Cong., 1st Sess. 29 (1989). See also, Comment, *Why Congress Should Not Legislatively Repeal The Feres Doctrine- A Struggle In Equity*, 18 TEX. TECH L. REV. 819 (1987).

88. H.R. REP. No. 87, 101st Cong., 1st Sess. 12-13 (1989).

89. 38 U.S.C. §§ 310-362 (Compensation for Service-Connected Disability or Death); 38 U.S.C. §§ 501-62 (Pension for Non-Service Connected Disability or Death or for Service); 38 U.S.C. §§ 401-23 (Dependency and Indemnity Compensation for Service-Connected Deaths); 38 U.S.C. §§ 601-54 (Hospital, Nursing Home, or Domiciliary Care and Medical Treatment); 38 U.S.C. §§ 701-88 (National Service Life Insurance).

90. Hale & J. McMahon, Special Study: *Study of Disability, Death, Survivor Benefits: Comparison of Private Sector, State, and Federal Programs with those for Military Personnel* (25 April 1985) (prepared for Office of Secretary of Defense, Director of Compensation).

compared the benefits systems of the military, federal civil service, General Motors, Marriott, IBM, and the states of Maryland and Virginia. The study compared death, disability, and survivor benefits for five different military paygrades. It found that military death benefits to surviving spouses and children are competitive with the other benefits programs.⁹¹ Likewise, the study found that military disability benefits are often higher and occasionally much higher than under the other programs.⁹² In fact, the only area where military benefits fell behind was death benefits for survivors of an unmarried servicemember.⁹³

As an example of benefits provided for servicemembers, the following figures were taken from the study's death benefits table⁹⁴ for an Air Force captain with six years of service, a twenty-four-year-old spouse, and two children, ages five and six:

Death Gratuity:	\$3,000
Burial Allowance:	\$1,400
Group Life Insurance (SGLI):	\$35,000
Survivors Income Continuation:	
Spouse:	\$430,920
1st Child:	\$6,600
2nd Child:	\$7,260
Educational Assistance:	
1st Child:	\$16,920
2nd Child:	\$16,920
Social Security Survivors Benefits:	\$339,900
Social Security Burial Allowance:	\$255
Total	\$858,175

Participation in SGLI is optional, partially subsidized, and costs \$4 per month (SGLI maximum benefit has increased from \$35,000 to \$50,000 since the study was conducted). The other benefits are automatic. The Survivors Income Continuation benefit is not lump sum, but, like Social Security, is computed according to average lifespan. While not always the case, the Air Force captain in this scenario had the greatest benefits package of those evaluated. The other figures ranged from \$286,800 for the Federal Civil Servant to \$732,755 for Marriott.⁹⁵

While VA benefits may provide adequate compensation in many cases, injuries and death occasionally occur of such tragic proportion that federal judges complain

91. *Id.* at 3.

92. *Id.*

93. *Id.*

94. *Id.* at 6.

95. *Id.* These figures for military benefits have not been adjusted up to reflect increases in Social Security, Survivor Benefit Plan, Dependency and Indemnity Compensation or Servicemen's Group Life Insurance (SGLI), which, with the exception of SGLI, are adjusted for inflation. The Federal Civil Servant and Marriott benefits would also presumably be higher now than at the time of the study.

of the draconian harshness of *Feres*.⁹⁶ Those tragedies also raise calls for legislative reform. One example where the victim had no right of recovery because of the *Feres* bar was presented by Representative Clarence E. Miller on behalf of his late constituent, Sergeant Timothy J. Adkins, USMC:

Sgt. Adkins died 16 days after having a tooth extracted at the Branch Dental Clinic, Marine Corps Air Station, Beaufort, South Carolina. The report of the Department of Defense Inspector General indicates that the follow-up care given Sgt. Adkins was "substandard." A review of Adkins' case indicated various delays in treatment of post extraction infection. Sterilization areas at the Branch Dentist Clinic were modified as a result of Sgt. Adkins' death.⁹⁷

Another tragedy was related by Representative Daniel Glickman of Kansas during the 99th Congress:

Jerry [Meagher] was 22 years old when he checked into Balboa Naval Hospital in 1974 to have a cyst removed from his left arm. Jerry is now severely brain-damaged and a quadriplegic. He requires 24-hours-a-day care. His mother testified before my subcommittee that it takes all of the VA compensation that Jerry receives, plus \$600 to \$800 a month to take care of Jerry.

With a situation like his in mind, it is easy to understand why people like Mrs. Meagher are outraged when they learn that federal prisoners in federal penitentiaries can sue the United States of America for medical malpractice, but our servicemen and servicewomen cannot.⁹⁸

Critics of the *Feres* doctrine argue that its modification will allow the courts equitably to resolve these particularly grievous claims.⁹⁹

One of the counterarguments to the plea for equity is that a soldier who heroically loses an eye in combat deserves as much compensation as one who loses an eye due to malpractice. Modifying *Feres* would belittle combat injuries by recognizing the insufficiency of VA benefits, yet prohibiting combat heroes from enjoying the additional compensation extended to peacetime claimants. Further, by dividing military casualties into two groups - one where VA benefits are the sole means of recovery and the other where VA benefits are just an alternate means of recovery - the political incentives for maintaining (and increasing) VA benefits at acceptable levels could dwindle. In other words, reducing the number of servicemembers exclusively dependent on VA benefits might reduce the political interest in maintaining VA benefits at adequate levels.

A final equity argument, raised by the *Feres* Court, points out that FTCA recovery for soldiers would be unfair because recovery varies according to local state tort law and soldiers do not control where they are stationed.¹⁰⁰ However, the Court in *United States v. Muniz*,¹⁰¹ took up the other side of the argument. The *Muniz* case raised the issue of whether federal prisoners can bring suit under the FTCA for negligence of government employees. Concerning whether varying state tort law should prevent prisoner recoveries, the Court found, "though the Government expresses some concern that the nonuniform right to recover will prejudice prisoners, it nonetheless seems clear that no recovery would prejudice them even more."¹⁰²

96. See *Scales v. United States*, 685 F.2d 970 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983); *Peluso*, 474 F.2d 605 (3d Cir. 1973), cert. denied, 414 U.S. 879 (1973); *James v. United States*, No. 75-1430, 530 F.2d 962 (1st Cir. 1976), cert. denied, 429 U.S. 998 (1976).

97. H.R. REP. No 87, 101st Cong., 1st Sess. 4 (1989).

98. *Feres Doctrine Military Malpractice Hearings on S. 489 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 15, 16 (June 24, 1986). (statement by Mr. Glickman).

99. *Id.* at 13; *Scales v. United States*, 685 F.2d 970 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983); *Peluso*, 474 F.2d 605 (3d Cir. 1973), cert. denied, 414 U.S. 879 (1973); *In re, "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242 (E.D.N.Y. 1984).

100. 340 U.S. 135, 144 (1950).

101. 374 U.S. 150 (1963).

102. *Id.* at 162.

To summarize the equity arguments: the uniform, no-fault VA benefits, while normally adequate, occasionally provide far less compensation than what could be recovered by a successful plaintiff in civil court. However, modifying the Feres doctrine would effectively deny overseas servicemembers, those injured by government negligence (other than medical malpractice), and combat heroes equality of compensation, in that the FTCA excludes them from bringing suit. And the proposed legislation discussed later in this article would not provide relief in these cases.

C. Potential to Deter Negligent or Wrongful Behavior

In addition to compensating victims, the tort process serves to deter future negligence by calling attention to unreasonable behavior and ensuring that tortfeasors pay for the costs of their negligence. The tort process also encourages investment in safety, quality assurance, and risk prevention measures, to reduce future tort liability. Critics of Feres argue that holding the military accountable for negligence by permitting FTCA claims could "send a message" to the military-identifying problem areas and providing incentive for future risk avoidance.

However, the FTCA message to correct negligent behavior is somewhat muted since the FTCA holds the Government, not the individual, liable.¹⁰³ Thus, the individual tortfeasors would not feel the punitive effect of an adverse monetary judgment.¹⁰⁴ Even the military services do not receive the full financial impact of the FTCA message, because FTCA awards come out of the judgment fund of the Federal Government, not out of the Defense Department budget.¹⁰⁵ The military already has incentives to employ vigorous quality assurance, risk management and inspection measures in that the military pays the medical bills when a member is injured or hospitalized. Therefore, it is already in the best interests of the military to invest prudently in training, quality health care, and safety so medical costs can be avoided.

D. Costs

The Congressional Budget Office has estimated that permitting military medical malpractice claims would cost the Department of Defense \$30 million per year in settlements.¹⁰⁶ This does not include claims arising out of combatant activities or claims arising in a foreign country. This figure also fails to incorporate the costs of litigation, including TDY expenses for alleged tortfeasors, and witnesses, and the associated cost of additional lawyers (both military and Department of Justice) to process the claims and litigation.

103. See 28 U.S.C. §§ 2679 (Federal Employee Liability Reform and Tort Compensation Act of 1988 (so-called *Westfall* Legislation)); 10 U.S.C. §§ 1089 (Gonzales Act for Health Care Providers).

104. It certainly cannot be said that medical personnel are not affected by claims filed against the Government. All claims are reviewed by experts, in accordance with AFR 168-13, for Quality Assurance (QA) purposes as well as for the purpose of determining if a claim should be paid. The "named" practitioner has an AF Form 2811 placed in his credentials file that sets out the allegation and the QA determination of whether or not the standard of care was met. This form remains in the file permanently and could affect future licensing, credentialing and insuring actions. If the claim is paid, the practitioner will be reported to the National Practitioner Data Bank, as soon as it is implemented as required by Public Law No. 99-660 (codified at 42 U.S.C. §§ 11100-152) and the Public Health Service Regulation, 54 Fed. Reg. 42,722. See also AFR 112-1, ch. 19 (31 Oct. 1989); AFR 168-3, Attachment 5, para. 9 (24 Nov. 1989).

105. See 31 U.S.C. §§ 1304 (1982). See also 28 U.S.C. §§ 2674; "Any award, compromise, or settlement in the amount of \$2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency."

106. H.R. REP. No 87, 101st Cong., 1st Sess. 8 (1989).

IV. LEGISLATIVE MODIFICATION OF THE FERES DOCTRINE

While the Supreme Court has invited Congress to repeal the Feres doctrine if it is dissatisfied with its controversial interpretation of the FTCA,¹⁰⁷ Congress has failed to do so during the forty years since the decision.¹⁰⁸ Recently, however, persistent voices have been calling on Congress to modify the Feres doctrine by amending the FTCA to allow military medical malpractice claims. House Resolution 1942 was brought before the Subcommittee on Administrative Law and Governmental Relations during the 98th Congress.¹⁰⁹ House Resolution 3174 passed the House during the 99th Congress;¹¹⁰ House Resolution 1054 passed the House during the 100th Congress;¹¹¹ and on 27 June 1989, House Resolution 536 passed the 101st Congress.¹¹² None of these bills have been considered by the Senate prior to adjournment.

The most recent bill, House Resolution 536, was proposed by Congressman Frank to amend chapter 171 of titles 28, United States Code, to allow military personnel to sue the Government for damages that arise from medical malpractice. As with the other provisions of the FTCA, House Resolution 536 would be subject to the combat activities and foreign country exceptions; thus claims arising from malpractice overseas or in combat situations would not be cognizable. Moreover, to prevent double compensation, the bill calls for reducing any settlement or judgment by the value of any government benefits to which the servicemember may be entitled.

The Committee on the Judiciary furnished the following arguments for the bill: (1) allowing soldiers to sue for malpractice will not diminish military discipline; (2) the threat of suit will result in improved medical care; (3) affording soldiers the full measure of their rights will enhance morale; and (4) equity requires that soldiers have the same rights afforded others.

Congressman Frank provided this equity argument when he moved to pass House Resolution 536 on 27 June 1989:

If you are an inmate in a Federal correctional institution and you are the victim of malpractice from a federally employed physician, you are allowed, as you should be, to sue for malpractice. If you are a veteran and you go to a veteran's hospital or you go to a base hospital, as your right

107. "[I]f we misinterpret the Act, at least Congress possesses a ready remedy." *Feres*, 340 U.S. 135, 138 (1950). "The failure of Congress to pass any amendments in more than three decades since the decision in *Feres* leaves little doubt as to congressional intent in this area." *Jaffee v. United States*, 663 F.2d 1226, 1237 (1981). "Nor has Congress changed this standard in the close to 40 years since it was articulated, even though, as the Court noted in *Feres*, Congress 'possesses a ready remedy' to alter a misinterpretation of its intent." *Johnson*, 481 U.S. 681, 686 (1987).

108. Interestingly, one author observes,

Since *Feres* was decided, Congress repeatedly has ratified it. Of recent note, for example, several Congresses have considered, but failed to enact, legislation that would allow servicemembers to bring medical malpractice suits. See H.R. 1161, 99th Cong., 1st Sess. 131 CONG. REC. H541 (daily ed. Feb. 20, 1985); H.R. 1942, 90th Cong., 1st Sess. 129 CONG. REC. H887 (daily ed. Mar. 4, 1983). Congress also has acted to extend *Feres*' application. See H.R. REP. NO. 384, 97th Cong., 1st Sess. 5, reprinted in 1981 U.S. CODE CONG. & ADMIN. NEWS 2692, 2695 (when Congress amended the FTCA in 1981 to include certain National Guardsmen, the House Judiciary Committee stated that its intent was that 'the rule of the *Feres* case should apply to the acts or omissions of National Guard personnel').

Bernott, *Fairness and Feres: A Critique of The Presumption of Injustice*, 44 WASH. & LEE L. REV. at 55 (1987).

109. H.R. 1942, 98th Cong., 1st Sess. (1983).

110. H.R. 3174, 99th Cong., 1st Sess. (1985).

111. H.R. 1054, 100th Cong., 1st Sess. (1987).

112. H.R. 536, 101st Cong. 1st Sess. (1989). Amendments proposing broader repeal of the *Feres* doctrine were introduced in both 95th and 96th Congress. See H.R. 2659, 96th Cong., 1st Sess. § 4 (1979); S. 695, 96th Cong., 1st Sess. (1979); S. 3314, 95th Cong., 2d Sess. (1978). DOJ and DOD

may be, and you are operated on by a military physician, you may sue for malpractice. If you are the dependent of an active duty member of the armed services and you are the victim of malpractice, you can sue for it. But if you are a marine or sailor or a soldier or a member of the Air Force, you cannot, and we think that it is inequitable.¹¹³

The U.S. Department of Justice (DOJ) and the Department of Defense (DOD) filed statements opposing House Resolution 536.¹¹⁴ In its statement supporting the Feres doctrine, the DOJ relied upon these familiar arguments: (1) The existence of a uniform, comprehensive, no-fault compensation program; (2) the impact on military discipline, morale, and effectiveness; and (3) the federal relationship between government and soldiers, and the unfairness of varying state tort law controlling military claims.

Specifically attacking the bill, the DOJ reasoned that military effectiveness and morale would suffer if a distinction were created between those who cannot recover because they are injured overseas, and those who are permitted to recover simply because they are injured in the United States. The DOJ also expressed equity concerns with barring recovery for battle injuries, while allowing recovery for medical injuries.¹¹⁵

The DOD took exception to the distinction made between peacetime and combat compensation. "Such legislation is based on a fundamental lack of understanding of the totality of the commitment that members of the Armed Forces are called upon to make. The need for complete commitment, discipline, and unfailing loyalty are not diminished in so-called peacetime."¹¹⁶

testified against H.R. 1054 and its companion bill S. 2490 in 1987. In testifying against H.R. 536, DOD restated its opposition:

The notion of military personnel suing the United States in tort runs counter to the accumulated wisdom and experience of all three branches of government.

Enacting S. 2490 or H.R. 1054, thereby creating the right to sue for malpractice, will open a Pandora's box of administrative, morale, and disciplinary problems in the Armed Services.

Such a law would threaten morale, as it would create a special class of litigants favored over all others.

Medical care in the military services is not in a state of chaos and disrepair. The Congress should not topple the well-established proscription against tort suits by active-duty military personnel in an ill-conceived effort to correct a problem that does not exist.

Tort lawsuits have never stopped or even diminished malpractice. Instead, the Department of Defense should be encouraged to press forward with aggressive quality assurance programs and with measures holding physicians accountable for their actions. These mechanisms are far more effective than a judgment paid by the Treasury, because our quality assurance and accountability programs benefit the entire patient population, not just those who win a lawsuit.

A compensation scheme already exists that can fairly compensate all injured person regardless of the cause of the negligence. If that compensation is inadequate, let's correct it.

The proposed legislation would create inequities in geographical areas covered. Servicemembers overseas could not sue; their compatriots in the United States could.

The proposed legislation is an expression of concern for the plight of those who have suffered real injuries. But its premises are faulty. First, neither H.R. 1054 nor S. 2490 would reduce malpractice or improve morale. Only the Department of Defense can do that as we aggressively pursue improved health care. Second, the financial objective of these bills would be best advanced by a thorough review of our no-fault benefits system, which could provide adequate, realistic compensation for service-connected injuries on a uniform basis without regard to the fortuitous circumstances of individual claimants.

H.R. REP. No. 87, 101st Cong., 1st Sess. 29 (1989).

113. 135 CONG. REC. H. 3224 (daily ed. June 17, 1989) (statement of Rep. Frank).

114. H.R. REP. No. 87, 101st Cong., 1st Sess. 10-30 (1989).

115. H.R. REP. No. 87, 101st Cong., 1st Sess. 17 (1989).

116. H.R. REP. No. 87, 101st Cong., 1st Sess. 21 (1989).

The DOD concluded that leaving the *Feres* doctrine intact would provide the greatest equity and national security. If, however, Congress feels compelled to advance recovery rights to servicemembers, then DOD prefers amending the Military Claims Act (MCA)¹¹⁷ to permit servicemembers to bring medical malpractice claims thereunder.

The MCA "provides an administrative remedy for the payment of claims for property damage, personal injury, or death, caused by either civilian or military personnel of the Armed Forces acting within the scope of their employment, or otherwise resulting from the noncombat activities of the Military Department."¹¹⁸ Advantages cited by DOD for amending the MCA rather than the FTCA are:

- (1) The MCA allows recovery for claims arising anywhere instead of just those arising in the United States; thus all military personnel could fit under the same coverage, resulting in greater equity and morale.
- (2) the MCA approach would preserve military effectiveness by precluding federal courts from intruding into the affairs of the military.
- (3) Military personnel would not be tied to the inflexible schedule of civilian courts, nor would the military be sapped by the expenses of litigation.
- (4) The cap on attorney's fees under the MCA would be 10% instead of the 20% settlement fee and the 25% litigation fee allowed if the case goes to court under the FTCA.
- (5) The MCA would not overload the already saturated judicial system.¹¹⁹

House Resolution 536 passed the House by voice vote in June 1989.

Each year since 1984, Senator Sasser has introduced legislation to modify the *Feres* doctrine to permit active duty members to bring suit in cases of military medical malpractice (similar to House Resolution 536). On January 22, 1990, Senator Sasser requested DOD's comments on proposed legislation that would permit active duty members to file administrative claims under the MCA. The proposed legislation provides that if the claim is not settled within 180 days, the claimant would have a judicial remedy under 28 U.S.C. §§ 1345(b) and 2674 (FTCA). A claim is barred if the medical malpractice occurred in a combat area, during maneuvers or exercises, or in connection with the use of Armed Forces in civil disasters or disturbances.

V. CONCLUSION

The *Feres* doctrine is the only judicially created exception to the FTCA. Over the years it has received criticism from jurists, academicians, and recently by lawmakers. The *Feres* Court admitted that if it had misinterpreted the FTCA, then Congress possessed "a ready remedy" to correct this misinterpretation. As of this writing, some forty years after the *Feres* decision, Congress has not acted – and the Supreme Court as recently as 1987 reaffirmed the doctrine. While there is and has been proposed legislation to modify the *Feres* doctrine to allow for judicial relief in medical malpractice cases, the bills have not received support from both Houses. In short, the *Feres* doctrine is very much alive today and might very well be alive for a long time in the future.¹²⁰

117. 10 U.S.C. § 2733 (1976).

118. H.R. REF. No. 87, 101st Cong., 1st Sess. 22 (1989).

119. H.R. REP. No. 87, 101st Cong., 1st Sess. 21-23 (1989).

120. Ironically, all of the recent proposed legislation would not have provided relief to Bernice B. Feres, as executrix under the last will and testament of Lt. Rudolph J. Feres, who sadly died in a barracks fire – and whose name may be remembered forever by military legal scholars as the subject of this controversial legal doctrine.

Personal Civil Liability for Federal Employees and Their Representation by the Department of Justice in the Aftermath of the *Westfall* Legislation – An Introduction for the Base Judge Advocate

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I. INTRODUCTION

Many people consider Americans the most litigious people in the world. In our courts, anyone can sue anyone else for any claim, and often does. As they carry out their duties and responsibilities, Air Force members and employees take actions that others frequently perceive as causing them injury. What is the usual American response? Sue them! Thus, a performance evaluation the ratee does not like becomes a defamatory statement; an apprehension for driving while intoxicated becomes a false arrest or perhaps a violation of the drunkard's fourth amendment rights; and the potential that at some future time there may be an authenticated launch order issued to Strategic Air Command missile crews becomes a violation of a resident alien's constitutional right to have the Congress declare war.

This article will acquaint the reader with the subject of representation by the Department of Justice (DOJ) for federal employees who are sued under a civil liability cause of action, and generally will describe the defenses routinely offered on behalf of those defendants. The treatment of the issue is general, and we will attempt to show the workings of the representation process in most cases. This article is focused to provide a general explanation of the types of theories urged against federal officials by plaintiffs, the procedures normally followed to gain DOJ representation of federal defendants, and the theories used to defend these cases. The focus is on damages claims against individual federal employees. We will not attempt to explore all of the possible equitable and injunctive remedies that plaintiff could seek. Such remedies would normally be sought against the federal official in his official capacity rather than against the individual.

II. CIVIL TORT LIABILITY – GENERALLY THREE KINDS

In examining the potential personal civil liability of federal employees, it will be helpful to distinguish the various theories upon which plaintiffs rely in attempting to reach federal officials as individuals. In general, we can divide them into three categories: (1) common law torts, (2) constitutional torts, and (3) federal statutory torts. We will examine each of these areas separately, despite the fact plaintiffs frequently allege more than one theory.¹

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1. For example, there were 28 new individual tort cases opened in the Constitutional Torts Branch of the Air Force General Litigation Division during calendar year 1988. Of those, only ten were brought under just one theory; the balance alleged some combination of common law, constitutional, and federal statutory torts.

A. Common Law Torts

A typical common law tort allegation is one that complains about adverse personnel actions, intraoffice communications, frustration over failure to be promoted or selected for a job in the competitive process, or about the "quality of life" in the work environment. Other frequently encountered common law tort allegations involve personal complaints about the plaintiff's supervisor or co-workers. Typically, such complaints are alleged as torts such as defamation, harassment, or an unspecified conspiracy against plaintiff.

B. Constitutional Torts

Constitutional tort lawsuits against federal officials allege that the official has committed a constitutional violation. Often this involves an otherwise minor problem, and the allegation is simply a recasting of a traditional common law tort in constitutional terms or a broad assertion that the official "violated plaintiff's rights under the Constitution." Where specific violations are alleged the theories most often advanced are: (1) "due process" violations under the fifth and fourteenth amendments, (2) illegal search allegations under the fourth amendment, and (3) denial of first amendment rights involving freedom of expression and expressive behavior.

It is under the latter theory that most actions challenging the ban on political protest activity at military bases, especially during Open House events, have been tested. The authority of base commanders to bar individuals from military installations is also likely to be challenged under this category, either in addition to, or in conjunction with, allegations of a failure of due process in the commander's decision to issue a bar letter. In most of these instances, however, the plaintiff sues the base commander as an official rather than as an individual.

C. Federal Statutory Torts

Federal statutory torts are often used as an adjunct to a common law or constitutional tort claim. In almost all cases seen in the Air Force General Litigation Division alleging federal statutory torts, plaintiffs plead civil rights violations or discrimination alternatively as statutory torts and as constitutional violations. Generally, the Air Force defends against allegations of this kind on procedural grounds. Usually, we can quickly dispose of such allegations by a motion to dismiss for lack of subject matter jurisdiction because the clear terms of the statute pleaded indicate that it does not apply. For example, plaintiffs commonly allege that the federal official has violated the plaintiff's civil rights in some way and has thereby also violated 42 U.S.C. § 1983. Unfortunately for plaintiffs, in order to provide a basis for relief, section 1983 requires that the violation be committed by someone acting under color of state law. In that federal officials act under color of federal rather than state law, section 1983 does not provide a basis of relief.

A potential growth area for lawsuits involving statutory torts is allegations of the various environmental statutes. To date, the Air Force General Litigation Division has seen no such actions. We will not deal with them here; they have been treated at length elsewhere.²

2. See Anderson & Lee, *Private Party Actions Against Federal Officials for Environmental Wrongs*, 31 A.F.L. REV. 31 (1989).

III. THE REPRESENTATION PROCESS

At this point it will be useful to discuss what happens while the agency attorney is attempting to figure out what the complaint is alleging (which can be a significant problem with many *pro se* complaints), and devising a strategy to defend the lawsuit.

Individual defendants who have been served with a summons and complaint are obviously concerned about the legal process into which they have been involuntarily dragged. Generally, the first indication a federal official has that he has been sued comes when service is made. Typically, the individual will then make a legal assistance appointment, hoping that the judge advocate or Air Force civilian attorney can make the whole problem disappear. Unfortunately, most law suits, even frivolous ones, are not that easy to defeat. Often, good advice and swift action are the best services most base offices can offer.

The most important thing to remember at this early stage of a case is that while DOJ representation may be available, the individual must request it.³ Unlike representation of a federal official sued in his official capacity, representation for an official sued as an individual is not automatic. The defendant official must take the first step before the period for filing a responsive pleading has expired.

Any federal official who has been sued for doing something even remotely connected with his federal job is a candidate for DOJ representation. The DOJ routinely and automatically represents federal employees sued in their official capacities.⁴ On the other hand, federal officials who are sued as individuals in either civil or state criminal proceedings⁵ have a right to request representation by the DOJ.⁶ While such requests are usually approved, representation by the DOJ is not a right. A refusal to grant representation is rare in Air Force experience. Nevertheless, it is important to note that a DOJ decision against representation cannot be challenged by the agency, and is *not reviewable* by the courts.⁷

Requests for representation made by Air Force members or employees are forwarded to the Air Force General Litigation Division (HQ USAF/JACL) which, in turn, forwards the request to the DOJ. In addition to the request itself, declarations from the requestor and his supervisor that the conduct complained about by the plaintiff was done within the scope of the official's duties must be forwarded.⁸ The content of the declarations should set forth the facts that demonstrate how the employee's action (or failure to act) was within the scope of his federal employment.

Unlike a lawsuit against the official in his official capacity, he is personally responsible for the satisfaction of any adverse judgment when sued as an individual. The Air Force has no process currently available that would allow reimbursement to an individual defendant for an amount he might be ordered to pay.⁹

3. The procedures to be used by Air Force members and employees who desire representation by the Department of Justice is set out in Air Force Reg. (AFR) 110-24, Litigation, Tax Disputes, Administrative Proceedings, and Legal Process, (10 Nov. 1982).

4. 28 U.S.C. §§ 516-19 grants statutory responsibility to the Department of Justice (DOJ) for the representation of federal employees who are sued in their "official" governmental capacity. Typically, that responsibility is delegated to the Office of the U.S. Attorney located where the action was filed, and an Assistant U.S. Attorney working in concert with an agency (Air Force) attorney, shares the duty of responding to, and defeating, the complaint. See also 28 C.F.R. § 50.3 and AFR 110-24, para. 102.

5. DOJ representation is not available in federal criminal proceedings. 28 C.F.R. § 50.15(a) (4).

6. See 18 C.F.R. § 50.15.

7. See *Falkowski v. EEOC*, 764 F.2d 907 (D.C. Cir.1985).

8. See AFR 110-24, attachments 1 (Request for Representation), 5 (Employee's Declaration), and 6 (Supervisor's Declaration) for suggested formats. Declarations under 28 U.S.C. § 1746 are usually used rather than affidavits for convenience.

9. The DOJ has developed procedures by which an application can be made, through channels,

A federal official sued as an individual may also hire private counsel, either to provided representation in concert with the DOJ attorney assigned to the case, if the representation request is approved, or as the official's sole counsel.¹⁰ Given that their personal assets are at risk, federal officials sued as individuals are generally anxious to mount the strongest defense possible, and want all available help. However, the cost of a private attorney can be beyond the range of many federal workers, and defendants almost always seek the services of a government attorney, at no additional personal cost.

Often, requests for representation and the accompanying declarations are forwarded to HQ USAF/JACL prior to the litigation report. This is usually due to a relatively short deadline within which to file a responsive pleading. Many plaintiffs, and some court clerks, indicate on the summons to be served on an official sued as an individual that a responsive pleading must be filed within twenty days following service. The DOJ and the Air Force have consistently taken the position that the proper period for filing a responsive pleading by a federal official should normally be sixty days.¹¹ In such cases, the local United States Attorney will generally file a motion to expand the response time to the appropriate period. Nevertheless, in such cases, the request for representation by the DOJ should be forwarded as quickly as possible so that HQ USAF/JACL can take the steps necessary to protect the official's interest and avoid a potential default judgment.

It is possible, but rather unusual, to obtain approval of an official's representation request by telephone. Typically, telephone coordination of a request takes place in state criminal proceedings in order to provide the requested representation in time for the official's initial appearance in state court.

When HQ USAF/JACL forwards the request for representation to the DOJ, they also provide an evaluation of the facts to help show why the action of the employee was within the scope of his federal duties. In addition, HQ USAF/JACL always makes a recommendation as to whether the agency believes the employee was acting within the scope of his employment. The DOJ bases its representation decision on two standards: (1) was the federal employee within the scope of his federal employment regarding the conduct alleged in the complaint, and (2) is it in the interest of the United States to provide representation to this federal employee.

The first criterion requires a determination that the federal official was attempting to carry out his federal duties. The second criterion generally requires that defending the legality of the action or inaction of the official advance the federal mission in question and promote the vigorous performance of duty by federal employees. The latter test is based on the belief that federal officials who are relieved from the burden of having to defend personally any lawsuits alleging wrong in their official conduct will, therefore, not be inhibited by fears of lawsuits in performing their official duties.

The evaluation of the representation request in light of these criteria requires knowledge of the details and circumstances giving rise to the complaint, and the relationship between the plaintiff and the defendant. Within the DOJ, a committee evaluates the representation decision. This committee is chaired by a Deputy Assistant Attorney General, who has the final vote on all questions of representation. The decision is premised on the facts contained in the statements which accompany a

for reimbursement of amounts required to be paid by a civil judgment. See 28 C.F.R. § 50.15(c).

10. In some cases in the context of this article, usually involving a conflict of interest among several codefendant federal officials, the DOJ may hire private counsel to represent the defendant federal official. See 28 C.F.R. § 50.16.

11. See FED. R. CIV. P. 12(a).

request for representation, reasonable inferences from those facts and, where available, the facts contained in the litigation report.

The only area in which problems arise in the representation process, in the experience of HQ USAF/JACL, is in suits against members of the Air National Guard. In fact, the only case within the Constitutional Torts Branch during the past two years in which representation was not granted was a National Guard case.¹² Because Guard members have both state and federal affiliation, it is often unclear whether the act complained of was undertaken exclusively in one or the other status. As a general matter, HQ USAF/JACL has taken the position that all lawsuits against members of the Air National Guard that appear likely to impose a judicial burden on military decision making, personnel training matters and assignment policy, and/or readiness, involving a unit or force that is in, or could be called into, federal status, have a sufficient federal connection to warrant the request for representation.¹³

When representation is granted, the DOJ notifies the United States Attorney where the action is ongoing and HQ USAF/JACL that the individual has been granted representation, and authorizes the United States Attorney to obtain a representation agreement from the federal official. It is common for the agency attorney to draft the first responsive pleading, as well as subsequent pleadings, and forward it to the Assistant United States Attorney for approval and filing.

IV. DEFENSES TO CIVIL TORT ACTIONS

In many of the lawsuits filed against federal officials, it is possible to argue that the court lacks jurisdiction to hear the case, that administrative remedies have not been exhausted, and/or that various governmental immunity theories shield the official from suit. Because these defenses to tort complaints against federal officials as individuals are generally very strong, as a matter of general practice, HQ USAF/JACL will resist filing an Answer to the Complaint, preferring to rely instead on some kind of dispositive motion. Filing an Answer opens the door to discovery, and discovery can be an extremely time-consuming endeavor, even in fairly simple cases. Thus, to allow it to take place unnecessarily defeats one of the purposes of providing DOJ representation — to minimize the distraction of the official who has been sued from his regular duties by the need to deal with the lawsuit.

A. Defense to Common Law Tort Causes of Action

The way in which government attorneys approach the defense of common law tort actions changed dramatically during 1988. The year began with the Supreme Court announcing its decision in *Westfall v. Erwin*,¹⁴ holding that "something more than minimal discretion" was required in order for a federal employee to qualify for

12. In *Watson v. Clark*, USDC ND NV, No. CV-N-88-237-ECR, filed 29 April 1988, the requests for representation of three Nevada National Guard officers were denied. The DOJ found that the gravamen of the complaint was a military discharge from the state Guard unit. The plaintiff subsequently lost his federal technician status, but purely as a consequence of having lost his state Guard affiliation. The DOJ found that the federal interest in the case was insufficient to warrant DOJ representation. The United States Attorney and agency counsel for the Air Force continued to participate in the case, because the National Guard Bureau and the Department of the Air Force had also been named. Plaintiff subsequently dismissed his lawsuit against the individuals in federal court and filed a similar action in state court. The individual defendants made representation requests in the state court action but they were again denied DOJ representation.

13. It is beyond the scope of this article to dwell on this area further but, generally speaking, representation is granted whenever an adequate federal interest is demonstrated.

14. ___ U.S. ___, 108 S. Ct. 580 (1988).

absolute immunity from common law torts. How much discretion was needed was a question the Court did not answer, suggesting instead that Congress was in a better position to make that judgment. This decision reinserted a "discretion" element into the immunity equation for federal employees, creating doubt as to whether a generally accepted practice prior to that time – basing absolute immunity on the sole question of whether the individual was acting within the scope of his federal employment – would survive.

Traditional immunity doctrine prior to *Westfall* had grown from the decision in *Barr v. Matteo*.¹⁵ In *Barr*, the Court outlined the immunity doctrine for federal employees. In *Westfall*, the court found the *Barr* court had intended that for the employee to be entitled to the protection of absolute immunity, he must be within the scope of federal duties, and engaged in some form of discretionary act. The Court wanted the federal official to be free to exercise decisionmaking discretion without potential tort liability inhibiting "the fearless, vigorous, and effective administration of policies of government."¹⁶

During the years after *Barr*, however, the test in many circuits turned on the sole question of scope, disregarding the element of discretion almost entirely. While there was some variance from circuit to circuit, for the most part scope of employment became the principal if not the sole test. The question of whether the federal employee was exercising discretion was arguably part of the qualifying test for immunity in some circuits, but by no means a necessity in others.

Westfall v. Erwin began as a state common law tort case. A federal government employee alleged that his supervisor had been negligent in carrying out his responsibilities with regard to directing the storage of certain supplies and, as a result of that negligence, the plaintiff was injured. After removing the case to the United States District Court, government counsel showed that the supervisor was acting within the scope of his employment, and moved for summary judgment based on absolute immunity, which the district court granted. The Court of Appeals for the Eleventh Circuit reversed, holding that a federal employee is entitled to absolute immunity only if the challenged conduct, in addition to being within the scope of his employment, is also a discretionary act. In a unanimous decision, the Supreme Court affirmed the Court of Appeals, and remanded the case for a determination whether the federal official had been exercising discretion, a subject not addressed by the government's first presentation in the district court. The Supreme Court strongly hinted in its opinion that a legislative solution should be pursued to clarify the area, saying:

Courts must not lose sight of the purposes of the official immunity doctrine when resolving individual claims of immunity or formulating general guidelines. We are also of the view, however, that Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context.¹⁷

B. The *Westfall* Legislation

With the prospect of exploratory litigation all over the country competing to define how much discretion is enough, the DOJ took the lead in drafting legislation so that Congress could provide the guidance suggested by the Supreme Court. This clarifying legislation eliminated once again the discretion question from the equation. The Federal Employees Liability Reform and Tort Compensation Act of 1988¹⁸

15. 360 U.S. 564 (1959).

16. *Id.* at 571.

17. ___ U.S. ___, 108 S.Ct. at 585 (1988).

18. Pub. Law No. 100-694 (hereinafter the *Westfall* legislation).

became law on November 18, 1988. The Act amended the Federal Tort Claims Act (FTCA)¹⁹ and made it the exclusive remedy for common law tort claims arising from actions taken by federal employees within the scope of their federal office or employment.²⁰ Consequently, whenever a common law tort claim is based on the action of a federal government officer or employee, including members of the military, who was acting within the scope of his federal duties, then that cause of action against the individual is precluded by statute. The sole remedy for the plaintiff, if any, lies in an action against the United States under the FTCA.

The application of the *Westfall* legislation extends to all lawsuits alleging common law torts against federal employees for actions that arise in the course of their federal duties. Congress used the term "common law torts" to include not only traditional case law remedies, but state statutory schemes that codify traditional common law as well. The legislative history cites the wrongful death statutes of the several states as an example and points out that the FTCA has long been recognized to apply to such statutory schemes.²¹ The amendments to the FTCA apply to all claims not yet reduced to final judgment as of the date of their enactment.²²

C. Attorney General Scope Certification

The first question to rise when a common law tort lawsuit is filed against a federal official as an individual, then, is whether the official was acting within the scope of his federal duties. The *Westfall* legislation authorizes the Attorney General of the United States to certify that an officer or employee was acting within the scope of his duties at the time of the alleged tortious conduct.²³ This is, of course, the kind of evaluation the DOJ has been making for years as an integral part of the decision-making process in the granting of federal representation. The Attorney General has formally delegated this power to United States Attorneys, Civil Division Deputy Assistant Attorneys General, and the Directors of the Torts Branch.²⁴

Unlike the decision of the DOJ on a request for representation, the *Westfall* legislation provides for judicial review in those cases in which the Attorney General refuses to certify "scope of office or employment."²⁵

The DOJ initially took the position that the certification of the Attorney General is conclusive,²⁶ but in August 1989, it abruptly reversed course. United States Attorneys were directed to "no longer argue that the certification . . . is conclusive and not subject to judicial review, except . . . for removal."²⁷ They were further directed to

19. 28 U.S.C. §§ 1346 (b), 2671-80 (hereinafter FTCA). The principal changes were to § 2679(d).

20. Statutes providing for an exclusive remedy for injuries caused by the acts of a particular class of federal officials are neither new nor novel to government litigation. See e.g., 42 U.S.C. § 233; 38 U.S.C. § 4116; 22 U.S.C. § 817(A); 10 U.S.C. § 1089(A) (restricting suits against DOD medical personnel); and 10 U.S.C. § 1054 (restricting suit against DOD attorneys).

21. H.R. REP. NO. 700, 100th Cong., 2d Sess. 6, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5945, 5950 (1988).

22. The language of the technical amendment effecting the changes in 28 U.S.C. § 2679 (d) is very broad, and includes: "all claims, civil actions and proceedings pending on, or filed on or after, the date of enactment of this Act." Pub. Law No. 100-694, 8(b). See also H.R. Rep. No. 700, 100th Cong., 2d Sess. 7, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5945, 5951 (1988).

23. 28 U.S.C. § 2679(d) (1) and (2).

24. 28 C.F.R. § 15.3 and pt. 15 at app.

25. 28 U.S.C. § 2679 (d) (3).

26. Memorandum to All United States Attorneys, Update #3 on P.L. 100-694 (the *Westfall* Legislation), (Dec. 28, 1988).

27. Memorandum to All United States Attorneys, Update #4 on P.L. 100-694 (the *Westfall* Legislation), (Aug. 18, 1989).

withdraw all such arguments in any pending litigation. The argument that the Attorney General's certification is conclusive was replaced with an argument that it is "entitled to great deference."²⁸

In most cases, it is unlikely that a plaintiff will challenge the certification. As the legislative history points out:

From the perspective of a person injured by the official conduct of a Federal employee, the ability to sue the United States under the FTCA generally has distinct advantages over a suit against the individual Federal employee. The FTCA has an established administrative procedure through which many claims can be expeditiously resolved without costly litigation. And, perhaps most important [...] the United States Government will be able to pay any judgment that is awarded, while an individual Federal employee may be "judgment proof". Therefore, [the *Westfall* legislation] not only protects Federal employees, but also will help many of those who may be injured by these employees.²⁹

In view of this reality, the only³⁰ situation in which the certification of the Attorney General is likely to be contested is when the FTCA provides no remedy against the United States. For example, there are several classes of claims for which the FTCA, by its own terms, will not provide a remedy.³¹ Of these claims, only three classes are generally of the sort upon which a suit against an Air Force member or employee as an individual might be based. These involve negligence in the execution of a statute or regulation;³² acts such as assault, battery, abuse of process, slander, or deceit;³³ and combatant activities.³⁴ Any government attorney detailed to represent a federal official will, of course, be bound by the DOJ policy prohibiting an argument that the certification is conclusive. In a case involving a tort where recovery from the United States is precluded, if the defendant official perceives the issue to be of vital importance to his case, he would be well advised to consider retaining, in addition to the detailed government counsel, private counsel to make the argument. A privately retained counsel would not, of course, be subject to the DOJ policy restriction.

Once a certification is made, the Government will substitute the United States as defendant and move to dismiss the individual defendant from the lawsuit. The court's ruling on that motion will normally mark the end of the defendant federal official's potential liability. Of course, he may continue to be important to the case as a witness or in some capacity other than defendant. From that point forward, the case proceeds, if at all, under the guidance of the provisions of the FTCA.

If the plaintiff began his quest for redress of whatever wrong had been alleged by filing a lawsuit against the individual federal officials only, the case after substitution will likely be ripe for a motion to dismiss on the basis that the plaintiff failed to exhaust the administrative requirements of the FTCA.³⁵ The *Westfall* legislation anticipated this situation, and allows a plaintiff sixty days following dismissal of the lawsuit to file an

28. *Id.*

29. H.R. REP. NO. 700, 100th Cong., 2d Sess. 5, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5945, 5948 (1988).

30. This disregards the vindictive plaintiff who brings suit for emotional reasons and is more interested in hurting those who "done him wrong" than in being made whole. Such a plaintiff is likely to contest a certification even if the FTCA provides for recovery from the United States and the defendant official is judgment proof.

31. See 28 U.S.C. § 2680.

32. *Id.* at § 2680(a).

33. *Id.* at § 2680(h).

34. *Id.* at § 2680(j).

35. Generally, a claim must be filed with the agency and a final agency decision must be rendered, or six months must pass without an agency decision, before jurisdiction will lie in a federal district court. See 28 U.S.C. § 2675.

administrative claim.³⁶ In no case, however, can a claim be filed more than two years after the date of the legislation's enactment.³⁷

Although the *Westfall* legislation fundamentally altered the approach to common law tort causes of action, it expressly does *not* apply to constitutional tort claims or to claims based on federal statutes.³⁸

D. Defenses to Constitutional Tort Causes of Action

Constitutional tort claims are generally aimed at individual defendants under a judicially-created cause of action first recognized in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.³⁹ In *Bivens*, the Supreme Court created a new tort remedy for money damages against a federal government official personally for violating the fourth amendment right of a citizen to be free from unreasonable search and seizure. The impact of the decision was to allow for the possibility of personal liability of federal public servants, even when they were carrying out official duties.

Protection of Air Force members and employees from liability imposed under constitutional tort causes of action normally rests with one or more of the following defenses: qualified immunity, intramilitary immunity, and/or exclusivity of remedies.

Qualified Immunity. The Court rejected use of the official immunity doctrine to protect federal officials from *Bivens* claims, and in its place developed a doctrine of qualified immunity. As a general rule, qualified immunity protects federal officers and employees sued for constitutional violations where their conduct does not violate clearly established constitutional rights. The current standard to be applied in measuring the employees's conduct is whether the act or omission was "objectively reasonable."

Following *Bivens*, the Supreme Court in *Butz v. Economou*⁴⁰ expanded the *Bivens* tort theory to include violations of the fifth amendment due process clause. The Court also explained that official or absolute immunity was still viable in common law complaints, but that for *Bivens* actions, the general rule henceforth would be qualified immunity. Further, it was the defendant's burden to prove that the challenged conduct was subjectively and objectively reasonable.⁴¹

The case development of qualified immunity took a dramatic turn in *Harlow v. Fitzgerald*.⁴² In that case, the Supreme Court stepped away from the "good faith" defense that had been the essence of *Economou*, and reformulated the test, stating: "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."⁴³ The Court emphasized later that what was involved was "immunity from suit rather than a mere defense to liability."⁴⁴

36. 28 U.S.C. § 2679(d) (5) (B). Normally a two-year statute of limitations applies to actions against the United States under the FTCA. 28 U.S.C. § 2401. However, a transition rule in the *Westfall* legislation allows a plaintiff to pursue an otherwise untimely administrative claim, provided: (1) the lawsuit itself was timely filed and (2) applicable state statutes of limitation would not bar the action.

37. Pub. Law No. 100-6948(d).

38. 28 U.S.C. § 2679(b) (2).

39. 403 U.S. 388 (1971).

40. 438 U.S. 478 (1978).

41. See *Gomez v. Toledo*, 446 U.S. 635 (1980).

42. 457 U.S. 800 (1982).

43. *Id.* at 818.

44. *Mitchell v. Forsyth*, 472 U.S. 511, at 526 (1985).

Qualified immunity extends to persons at all levels of the Federal Government. This immunity is not limited to policy making or senior officials.⁴⁵ This is settled law in light of the Court's more recent decisions in cases such as *Anderson v. Creighton*,⁴⁶ and *Malley v. Briggs*,⁴⁷ which recognized that law enforcement officers are protected by qualified immunity.

In *Anderson v. Creighton*, the Court defined the central inquiry of this doctrine as one to determine what the clearly established law was at the time the federal official acted, and whether his conduct violated that law. The Court ruled that only preexisting law defining or interpreting constitutional rights would be considered and no new or novel interpretations of the Constitution would be held against the federal official:

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of preexisting law the unlawfulness must be apparent.⁴⁸

This was not unexpected as the Court had earlier indicated that so long as there was a legitimate question about the constitutionality of particular conduct, it would not rule that the conduct violated clearly established law.⁴⁹

Intramilitary Immunity. Whenever a military plaintiff is involved, the *Feres*⁵⁰ doctrine—or intramilitary immunity, as it is sometimes called, presents a strong defense to both common law and constitutional tort actions. Its strength and application to both types of actions derives from a unique characteristic: the focus is on the status of the plaintiff rather than the status or conduct of the defendant. Consequently, if the plaintiff was a member of the Armed Forces when the alleged tortious conduct occurred and the injuries arose out of or were incident to the plaintiff's service, then the plaintiff is blocked from recovering for those torts. It is immaterial whether the plaintiff has sued military or civilian co-workers, superiors or subordinates, or even the United States directly, all are protected under the *Feres* doctrine.

Feres involved an FTCA claim; *Chappell v. Wallace*⁵¹ extended the doctrine to constitutional torts. *Chappell* was a *Bivens* action in which Navy enlisted men sued their commander, alleging racial discrimination. The Supreme Court held that the unique disciplinary structure of the military establishment and Congress' activity in enacting procedures and remedies for dealing with claims of discrimination, constituted "special factors" which dictated that it would be inappropriate to allow a *Bivens* remedy against a superior military officer.

The scope of injuries incident to service and thus barred by the *Feres* doctrine is broad enough to encompass virtually any injury for which a plaintiff might seek to sue a federal official individually. In *United States v. Stanley*,⁵² the Supreme Court reaffirmed the *Feres* doctrine and broadened the scope of the incident-to-service test. The case arose out of a government program involving secret administration of the drug lysergic acid diethylamide (LSD) to unknowing servicemen in 1958. The goal of the program was to test the effects of LSD on human subjects who were not aware

45. See e.g., *Sladana v. Garza*, 684 F.2d 1159, 1163-64 (5th Cir. 1982), cert. denied, 460 U.S. 1012 (1983).

46. 481 U.S. ___, 107 S.Ct. 3034 (1987).

47. 475 U.S. 335 (1986).

48. 481 U.S. ___, 107 S.Ct. 3034, at 3039 (1987) (citations omitted).

49. *Mitchell v. Forsyth*, 472 U.S. 511, 535, at n.12 (1985).

50. *Feres v. United States*, 340 U.S. 135 (1950).

51. 462 U.S. 296 (1983).

52. 483 U.S. 669 (1987).

it had been given. Despite the apparent intentional violation of Stanley's constitutional rights, the Court denied him relief based on *Feres* and *Chappell*.

Exclusivity of Remedies. Where Congress has established a scheme of remedies available to injured parties and evidenced an intention that the scheme provide the only remedies, courts will generally not provide a judicially created remedy as well. In *Bush v. Lucas*,⁵³ the Supreme Court explained the principle this way:

The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. That question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff. The policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy ⁵⁴

Typically the exclusive remedy argument seeks the dismissal of an action alleging discrimination in connection with the plaintiff's federal employment brought against a federal official individually. In other cases, the complaint alleges the violation of some other constitutional rights where an adverse action occurred during the federal employment. These too can be overcome by arguing that an exclusive remedy exists precluding the action against the individual federal defendant. Two examples will illustrate the application of this defense.

In *Brown v. General Services Administration*,⁵⁵ the Court found that Congress had clearly intended for Title VII of the Civil Rights Act of 1964⁵⁶ to provide the exclusive remedy for claims of federal employment discrimination. Examining the legislative history of the 1972 amendments to the Act, which brought federal employees within its protection, the Court found exclusivity to have been the Congressional intent although there had been no explicit declaration to that effect. If the plaintiff has exhausted the administrative requirements of Title VII, he may seek relief against the United States by bringing suit against the head of the department as the defendant. In the case of the Air Force, the proper party is the Secretary and a suit against any other official as an individual will fail.

Likewise, in *Bush v. Lucas*,⁵⁷ the Court rejected the opportunity to create a remedy outside the Civil Service system for violations of constitutional rights which occur in adverse employment actions. After discussing the growth and historic development of the Civil Service system, the Court said:

Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedure – administrative and judicial – by which improper action may be redressed. They apply to a multitude of personnel decisions that are made daily by federal agencies. Constitutional challenges to agency action, such as the First Amendment claims raised by petitioners, are fully cognizable within this system. [T]he Government's comprehensive scheme . . . provides meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies.⁵⁸

53. 462 U.S. 367 (1983).

54. *Id.* at 388.

55. 425 U.S. 82 (1976).

56. 42 U.S.C. §§ 2000e-2000e-16.

57. 462 U.S. 367 (1983).

58. *Id.* at 385-86 (footnotes omitted).

IV. CONCLUSION

The American attitude toward litigation being what it is, government attorneys in all agencies will be well occupied dealing with lawsuits against federal officials as individuals for the foreseeable future. However, the officials' exposure to potential personal liability has been clearly limited by the *Westfall* legislation. Together with the defenses and immunities previously available, it provides government attorneys with powerful tools to protect federal officials from being required to pay money damages to persons who believe they have been injured by the officials' proper performance of their duties.

Qui Tam: White Knight or Trojan Horse

MAJOR JOHN C. KUNICH, USAF

I'm from the government and I'm here to help you.
—Anonymous government official

I'm a qui tam relator and I'm here to help the government.
—Anonymous citizen

I. INTRODUCTION

It sometimes seems that, as with the weather, everybody talks about fraud against the Government but nobody does anything about it. The False Claims Act (FCA)¹ is a major attempt by Congress to do something about it.² This article deals specifically with a key component of the FCA: the private enforcement or *qui tam*³ provisions. It will first trace the history of *qui tam* actions in general, and particularly those under the FCA. Then, after examining the recent statutory changes and the current state of the case law, the article discusses the potentially enormous implications for the military.

II. HISTORICAL BACKGROUND

Qui tam actions have roots reaching back to fifteenth century England, where an informant who uncovered evidence of illegality was awarded a share of the penalties paid by the wrongdoer, while the Government received the remainder.⁴ During the infancy of the United States, the First Congress imported the British tradition of private citizen enforcement of public rights by including *qui tam* provisions in ten (and arguably twelve) of the first fourteen American statutes imposing penalties.⁵

The present-day FCA had its origin during the American Civil War, when rampant fraud on the part of government contractors cheated the Union out of resources it could

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1. 31 U.S.C. §§ 372-933.

2. The legislative history of the 1986 amendments indicates that the purpose is "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." Congress lamented the "growing pervasiveness of fraud" and, to meet the challenge, modernized "the Government's primary litigative tool for combatting fraud." S. REP. NO. 345, 99th Cong., 2d Sess. 2 (1986), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5266.

3. *Qui tam* is the short form of the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which means "who brings the action for the king as well as for himself." See W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (1768), Book the Third, *160. As long ago as 1424, Parliament authorized *qui tam* actions to enforce statutory penalties. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1406 (1988). These British penal statutes usually provided for enforcement by a fine payable "to any such person or persons as will sue for the same . . ." Any suit by a private person to recover a penalty was called an "informer action." If the entire penalty went to the informer, the suit was termed a "popular action;" but where part of the fine would be paid to the king and part to the informer, the suit was called an "action *qui tam*." W. BLACKSTONE, *supra*, at *160-61. In the United States today, in addition to the FCA, *qui tam* provisions are included in several other federal statutes, e.g., in the area of patent infringement (35 U.S.C. § 292).

4. Note, *The Qui Tam Doctrine: A Comparative Analysis of its Application in the United States and the British Commonwealth*, 7 TEX. INT'L LAW J. 415, 417-18 (1972).

5. See *United States ex rel. Stillwell v. Hughes Helicopter, Inc.*, 714 F. Supp. 1084, n.2 (C.D. Cal. 1989). For example, the First Congress included *qui tam* provisions in statutes governing marshals' misfeasance in census-taking (Act of March 1, 1790, ch. 2, sec. 3, 1 Stat. 101, 102 and Act of July 5,

ill afford to lose.⁶ In 1863, at the request of President Lincoln, Congress passed the False Claims Act, including a *qui tam* provision.⁷ The FCA granted private persons⁸ (known as "relators" because the action is brought "on relation of" the citizen) the opportunity to sue on behalf of the Government based on frauds against the Government. In this regard, Congress and the President hoped to enlist the aid of private individuals in the fight against fraudulent defense contractors.⁹ In addition to actions brought by the Government itself, a veritable citizens' army would join in the struggle to root out fraud against the United States and replenish the sovereign's coffers.

Congress recodified the FCA in 1873. The only change to the *qui tam* provisions was a bar on action brought against military members.¹⁰ Thereafter, it was not until World War II that circumstances moved Congress to amend the act to a significant extent.

The FCA was amended in 1943 to bar so-called "parasitic suits" based on information already in the Government's possession.¹¹ The catalyst for the restrictive amendments was the United States Supreme Court decision in *United States ex rel. Marcus v. Hess*.¹² That case held that the 1863 version of the FCA did not require the

1790, ch. 25, sec. 1, 1 Stat. 129); harboring runaway mariners (Act of July 20, 1790, ch. 29, sec. 4, 1 Stat. 131, 133); unlicensed Indian trade (Act of July 22, 1790, ch. 33, sec. 3, 1 Stat. 137, 137-38); unlawful trades or loans by Bank of United States subscribers (Act of February 25, 1791, ch. 10, secs. 8, 9, 1 Stat. 191, 195-96); and avoidance of liquor import duties (Act of March 3, 1791, ch. 15, sec. 44, 1 Stat. 199, 209). All of these statutes expressly authorized suits by private "informers," with any recovery to be shared between the United States and the informer. Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 342 n. 3 (1989). See also, Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?* 78 YALE L.J. 816, at 826-27 (1969); Winter, *supra* note 3, at 1406-09. As a matter of possible interest, the famous case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) involved a *qui tam* action.

6. War profiteering resulted in windfall profits for contractors who became "proverbially and notoriously rich Some made fortunes with practically no outlay or exertion of their own." 1 F. SHANNON, *THE ORGANIZATION AND ADMINISTRATION OF THE UNION ARMY 1861-1865*, at 55 (1928). As indicated in a contemporary periodical, "For sugar [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories." *Id.* at 55-56, quoting Tomes, *Fortunes of War*, 29 HARPER'S MONTHLY MAG., 228 (July 1864).

7. Act of March 2, sec. § 1863, ch. 67, 12 Stat. 696-99.

8. "Private person" includes corporations, associations, firms, partnerships, societies, and joint stock companies. See 1 U.S.C. § 1. Also, the term "private" has been deemed to distinguish *qui tam* relators from the Attorney General, who may also bring action for FCA violations, rather than signifying only private sector, nongovernment employees. Erickson *ex rel. United States v. American Institute of Bio. Sciences*, 716 F. Supp. 908, n.12 (E.D. Va. 1989).

9. The sponsor of the legislation, Senator Howard, stated that the *qui tam* actions were included because of "the old fashioned idea of holding out a temptation and 'setting a rogue to catch a rogue.'" CONG. GLOBE, 37th Cong., 3d Sess. 955-56 (1863), quoted in *United States ex rel. Newsham v. Lockheed*, 722 F. Supp. 607, 609 (N.D. Cal. 1989). The original FCA authorized the relator one half of any recovery, with the other half going to the Government. *Supra* note 7, at 698. Phrased another way, Congress inserted the *qui tam* provisions because of

the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

United States v. Griswold, 24 F. 361, 366 (D. Ore. 1885).

10. See Title 36, Rev. Stat. 3490-94, 18 Stat., pt. 1, 695-96 (1873). The FCA allowed *qui tam* suits to be brought by military members and other government employees, however.

11. Relators often brought action based solely on public information obtained from criminal indictments; when an indictment became public, a litigative feeding frenzy would soon follow as would-be bounty hunters rushed to the courthouse to begin *qui tam* proceedings. See *United States ex rel. Newsham v. Lockheed*, 722 F. Supp. 607 n. 3 (N.D. Cal. 1989).

12. 317 U.S. 537 (1943).

relator of a *qui tam* action to be an independent source of the information leading to the suit, nor did the Attorney General have exclusive control over civil cases for fraud against the Government. Congress responded with the 1943 amendments, which precluded *qui tam* actions based on information already in the possession of the Government or any of its employees at the time of the suit.¹³

The 1943 amendments caused a significant reduction in *qui tam* litigation. Also, a series of judicial decisions further tightened the reins on *qui tam* suits by strictly interpreting the FCA, both as to its burden of proof standards and the bar on private *qui tam* actions based on information already known to the Government.¹⁴ These limitations, together with growing publicity concerning fraud against the Government, particularly in the area of defense contractors, led to the 1986 amendments.

III. 1986 AMENDMENTS

In 1986, Congress deliberately set out to strengthen the FCA, the Government's "primary litigative tool for combatting fraud," with amendments intended "not only to provide the Government's law enforcers with more effective tools, but to encourage any individual knowing of Government fraud to bring that information forward."¹⁵ To meet the challenge of "sophisticated and widespread fraud," Congress felt that "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds."¹⁶ Congress left undisturbed the long-standing provisions allowing for enforcement actions to be initiated by the Government, or by a *qui tam* relator, but for the first time provided for joint prosecution by a combination thereof.¹⁷ Also, the 1986 amendments significantly sharpened the teeth of the FCA and made it easier for FCA suits to be prosecuted successfully.

13. The 1943 amendments were codified at 31 U.S.C. § 232. In effect, they blocked all *qui tam* actions by government employees by denying courts jurisdiction over *qui tam* actions "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." Ch. 377, 57 Stat. 609, 1943. Congress was concerned that allowing government employees to bring such actions would encourage them to become amateur bounty hunters, searching for fraud rather than doing their jobs. Also, Congress intended to prevent government workers from feeding information to nongovernment associates and indirectly profiting from *qui tam* suits in that manner. See 89 CONG. REC. 10,846 and 10,849 (1943), cited in *Erickson v. American Institute of Bio. Sciences*, 716 F. Supp. 908 n.18 (E.D. Va. 1989), and accompanying text. The 1943 amendments provided for no more than 10 percent of the recovery to be awarded to the relator in cases carried on by the Government, with up to 25 percent allowed in cases where the Government did not intervene. In no case was any recovery *guaranteed* the relator. Also, for the first time, the FCA allowed the Government to intervene and assume exclusive responsibility for litigating *qui tam* actions; the original plaintiff could only continue the prosecution if the Government failed to intervene or to carry on the suit with "due diligence." Ch. 377, 57 Stat. 608-09, 1943. Prior to 1943, the relator plaintiff would exclusively control any *qui tam* suit. The entire False Claims Act was recodified in 1982 at 31 U.S.C. § 3729-31, but no substantive changes were made. See H.R. REP. NO. 97-651, 97th Cong., 2d Sess. 3, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS, 1895-96.

14. Courts found the jurisdictional bar to apply even where the Government made no effort to investigate or take action after the original allegations were received from the relator. See *United States ex rel. Lapin v. International Business Machines Corp.*, 490 F. Supp. 244 (D. Hi. 1980). Especially controversial was the holding in *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), where the state of Wisconsin was barred from acting as a *qui tam* relator in a Medicaid fraud action, despite the fact that the state had conducted the entire investigation. The court found that the information was in the possession of the federal government as a result of disclosures by Wisconsin to the Department of Health and Human Services; in fact, these disclosures were mandated by federal law. In the aftermath of this holding, in June, 1984 the National Association of Attorneys General adopted a resolution that such restriction "unnecessarily inhibits the detection and prosecution of fraud on the Government." The resolution also urged Congress to amend the FCA to remedy the situation. *Supra* note 2, at 5277-78.

15. *Supra* note 2, at 5266-67.

16. *Id.* at 5267.

17. 31 U.S.C. § 3730 (c) (1). However, if the Attorney General first initiates an action under the

While increasing the potential civil liability for certain acts and redefining the *scienter* requirements, the 1986 amendments left the list of such acts ("false claims")¹⁸ substantively unchanged. The FCA provides for the liability of any person¹⁹ who

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; (2) knowingly makes, uses or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; (4) has possession, custody, or control of property or money used, or to be used, by the Government, and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt; (5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; (6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government[.]²⁰

In response to restrictive court rulings, "knowing" was defined so as to include actual knowledge, deliberate ignorance, and reckless disregard of the truth or falsity of the information,²¹ thereby significantly ameliorating the problems of proof that had frustrated those attempting to establish acts of knowing fraud against the Government. The 1986 amendments also made clear that it is not necessary under the FCA to establish specific intent to defraud.²²

Congress increased the potential civil penalty; a defendant now faces a minimum of \$5000 up to a maximum of \$10,000 for every separate false claim, *plus* three times the amount of damage suffered by the Government because of the defendant's acts.²³

FCA, pursuant to 31 U.S.C. § 3730(a), this precludes a private party from bringing a *qui tam* suit based upon the same underlying facts. *Id.* at § 3730(e) (3).

18. "Claim" is defined to include

any request or demand, whether a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c).

The FCA does not apply to actions regarding the collection of unpaid taxes. *Id.* at § 3729(e). See *United States ex rel. Roberts v. Western Pacific R. Co.*, 190 F.2d 243 (9th Cir. 1951), *cert. denied*, 342 U.S. 906 (1951); *United States ex rel. U.S. -Namibia v. Africa Fund*, 588 F. Supp. 1350 (S.D.N.Y. 1984); and *Black Prince Distillery, Inc. v. United States*, 586 F. Supp. 1169 (D.N.J. 1984).

19. Now including military members. The military had been excluded from liability under the FCA since the 1863 amendments, when the Government had available "more severe military remedies." Congress felt that, under the current state of the law, "military code remedies are inadequate to ensure full recoveries for fraudulent acts by servicepersons and such persons should therefore not be exempt" from FCA liability. *Supra* note 2, at 5280, 5283.

20. 31 U.S.C. § 3729(a). Subparagraph (7) resolved in the affirmative a split of judicial opinion as to whether the FCA applies to fraudulent misrepresentation to avoid paying money owed the Government, the so-called "reverse false claim." *Supra* note 2, at 5283.

21. 31 U.S.C. § 3729(b).

22. *Id.* The 1986 amendments settled a split of judicial opinion on the necessity of proving specific intent to defraud. Previously, for example, *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972) and *United States v. Mead*, 426 F.2d 118 (9th Cir. 1970) had held such proof to be required, while *United States v. Hughes*, 585 F.2d 284 (7th Cir. 1978) and *United States v. Cooperative Grain and Supply Co.*, 476 F.2d 47 (8th Cir. 1973) had held to the contrary.

23. 31 U.S.C. § 3729(a). This includes consequential damages. *Supra* note 2, at 5284. The FCA

Thus, if a person "knowingly" overcharges the Government on twenty invoices, the statutory penalty could total up to \$200,000 plus treble damages on the amount of the overcharge. Each false claim is a separate violation of the FCA and is separately punishable.

The 1986 amendments opened wider the door for *qui tam* actions by drastically limiting the jurisdictional bar on suits based upon information already in the Government's possession. Now, the only jurisdictional prohibition is on *qui tam* suits based on

public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an *original source* of the information.²⁴

Previously, if the information underlying the action were already in the possession of the "government," broadly defined,²⁵ a *qui tam* action was barred, irrespective of whether the relator was the source of the information. This is a major expansion of *qui tam* jurisdiction, evidently making it possible for defense contractors and government employees to bring action predicated upon any "non-public" information, irrespective of whether somebody in the Government already possesses it. And, in cases in which the information derives from a "public" source, a *qui tam* suit is still permissible where the relator is an "original source" thereof.²⁶

A guaranteed share in any recovery is another enticement in the 1986 amendments designed to encourage *qui tam* actions. If the Government intervenes in a *qui tam* suit and assumes primary responsibility for the litigation, the relator is guaranteed at least fifteen percent but not more than twenty-five percent of the proceeds or settlement. In cases where the Government does not proceed with the case and the relator pursues the action without governmental assistance, the relator is assured at least twenty-five percent but not more than thirty percent of the recovery.²⁷ Moreover,

now also provides for only double rather than treble damages in instances where the violator "comes clean" and furnishes the Government with complete information and full cooperation before any action commences against the violator. 31 U.S.C. 3729(a). Prior to the 1986 amendments, the FCA had allowed only a maximum of \$2000 per false claim, plus double damages, under any circumstances.

24. 31 U.S.C. § 3730 (e) (4) (A) (emphasis added). Note that if the Government intervenes in the case, a *qui tam* action is permissible even if the action is based on "publicly disclosed" information and even if the relator is not an original source of that information. If the Government fails to intervene, however then a *qui tam* action based on publicly disclosed information is jurisdictionally barred unless the relator is an original source.

25. "In the possession of the government" included material in the possession of "the United States or any agency, officer, or employee thereof." See *Erickson ex rel. United States v. American Institute of Bio. Sciences*, 716 F. Supp. 908, 916 (E. D. Va. 1989). Pre-1986 cases interpreting "possession" include *United States v. Rippetoe*, 178 F.2d 735 (4th Cir. 1949); *United States ex rel. McCans v. Armour & Co.*, 146 F. Supp. 546 (D.D.C. 1956) *aff'd*, 254 F.2d 90 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 834 (1958); *United States v. Aster*, 275 F.2d 281 (3d Cir. 1960), *cert. denied*, 364 U.S. 894 (1960); *Safir v. Blackwell*, 579 F.2d 742 (2d Cir. 1978), *cert. denied*, 441 U.S. 943 (1979); *Pettis ex rel. United States v. Morrison-Knudson Co.*, 577 F.2d 668 (9th Cir. 1978); *United States v. Burmah Oil Co.*, 558 F.2d 43 (2d Cir. 1977), *cert. denied*, 434 U.S. 967 (1977); and *United States ex rel. MacFarlane v. Hutchinson*, 519 F. Supp. 563 (D. Colo. 1981).

26. "Original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before bringing action. 31 U.S.C. § 3730(e) (4) (B).

27. *Id.* at § 3730(d) (1) and (2). The minimum amounts have been called "finder's fees" which the relator will receive as a matter of right solely for bringing the case to light. Amounts greater than the minimum may be awarded on the basis of the significance of the relator's further contributions to the litigation. *Supra* note 2, at 5293. Where the Government intervenes in the suit and the court finds the action to be based primarily on public information relating to "allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media" of which the relator is not an

the relator in either instance is entitled to "reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs," all of which are paid by the unsuccessful defendant.²⁸

As a final encouragement to would-be *qui tam* relators, there are now protections for "whistle blowers" to safeguard them against possible reprisals.²⁹ If an employee is "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against" by the employer because of lawful acts in furtherance of a *qui tam* action, he is entitled to complete reinstatement, including whatever is necessary to "make the employee whole." For example, the wronged relator/employee could receive double the amount of back pay, plus interest, and compensation for any special damages resulting from the discrimination, including litigation costs and attorneys' fees.³⁰

IV. QUI TAM PROCEDURE

Qui tam actions are brought by a person, for that person and the United States Government, in the name of the Government.³¹ So long as the Government has not previously initiated action on its own, a *qui tam* suit is possible.³² The relator must initially serve the Government, *i.e.*, the Department of Justice (DOJ) with a copy of the proposed complaint and "substantially all material evidence and information" the relator possesses relevant to the complaint.³³ Simultaneously, the relator files the complaint with the appropriate federal district court, *in camera*, (where it must remain under seal for at least sixty days, during which time the DOJ must decide whether to intervene.)³⁴ The complaint is not served on the defendant until the court so orders, at which time the defendant will have twenty days to respond.³⁵

During the sixty-day period (plus any extensions granted) in which the complaint is under seal, the DOJ may intervene and proceed with primary responsibility for litigating the action, or notify the court that it declines to intervene, in which

original source, the relator is entitled to no more than 10 percent of the recovery. 31 U.S.C. 3730(d) (1). Note that the language in this section exactly parallels that of 31 U.S.C. 3730(e) (4) (A). Thus, when such "publicly disclosed information" is the basis for a suit, a *qui tam* action is absolutely barred unless the relator is an original source of the information or the government intervenes in the case. And, unless the relator is an original source, his share of the recovery would be limited to no more than 10 percent. Finally, if the court finds that the relator is the person "who planned and initiated the violation" upon which the suit is based, there are provisions for reducing or eliminating his share of the proceeds. *Id.* at § 3730(d) (3). This last section was added pursuant to the Major Fraud Act of 1988, 102 Stat. 4631, 4638 sec. 9 (19 Nov. 1988).

28. 31 U.S.C. § 3730 (d) (1) and (2).

29. The legislative history contains several references to the reluctance of people to come forward with evidence for fear of reprisals, as well as instances where employees were made to suffer for bringing fraud into the public eye. *See supra* note 2, at 5269-71.

30. 31 U.S.C. § 3730(h).

31. The United States is a party in every *qui tam* action, irrespective of government intervention in the case. *See* United States v. B.F. Goodrich, 41 F. Supp. 574, 575 (S.D.N.Y. 1941); Minotti v. Wheaton, 630 F. Supp. 280, 282-83 (D. Conn. 1986).

32. *See supra* note 17.

33. 31 U.S.C. § 3730(b) (2).

34. *Id.* The Government may move for an extension, but only for good cause shown. *Id.* at § 3730(b) (3). Congress intended the practice of keeping the complaint under seal for the first 60 days to afford the Government sufficient time to evaluate the *qui tam* suit and determine whether it is in the Government's interests to intervene, as well as whether the suit involves matters the Government is already investigating, without prematurely alerting the defendant. *Supra* note 2, at 5289. Congress also felt that, in the vast majority of cases, 60 days is adequate time for government coordination, review, and decision, and that "good cause" for an extension would *not* be established merely upon showing that the Government was overburdened and, as a result of workload, had not had a chance to address the complaint. *Id.* at 5289-90.

35. 31 U.S.C. § 3730(b) (3).

instance the relator has the right to proceed alone.³⁶ Even if the Government intervenes, the relator has the right to continue as a party to the action,³⁷ subject to certain limitations, and no one else other than the Government can intervene or bring a related action based on the same underlying facts.³⁸

Where the Government intervenes, it will not be bound by any act of the relator.³⁹ Moreover, the Government may dismiss the action over the relator's objections, provided the relator is notified and the court allows the relator an opportunity to be heard on the issue.⁴⁰ Similarly, the Government may settle the case despite the relator's objections if the court determines, after a hearing, that the proposed settlement is "fair, adequate, and reasonable under all the circumstances."⁴¹ And if the Government shows that unrestricted participation by the relator in the litigation would "interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment," the court may limit the relator's participation. The court would have discretion to limit the number of witnesses the relator calls as well as the length of their testimony, limit the relator's cross-examinations, or impose other restrictions.⁴²

In actions where the Government fails to intervene, it is still entitled to receive, upon request and at government expense, copies of all pleadings filed and all deposition transcripts. In addition, upon a showing of good cause and "without limiting the status and rights of the person initiating the action," the Government may be allowed to intervene at a later date, beyond the expiration of the initial sixty days plus any extensions.⁴³

Regardless of whether the DOJ intervenes, if it can show *in camera* that the relator's discovery actions would interfere with the investigation or prosecution of any criminal or civil matter arising out of the same facts, the court may stay discovery for up to sixty days. This stay may be extended upon a further showing *in camera* "that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings."⁴⁴ On the other side of the discovery coin, the FCA empowers the Attorney General to issue a "civil investigative demand" (CID) when there is reason to believe that "any person may be in the possession, custody, or control of any documentary material or information relevant to a false claims law investigation." A properly served CID may require the recipient to produce documents for inspection and copying, answer written interrogatories, give oral testimony, or any combination thereof.⁴⁵

36. *Id.* at § 3730(b) (4) (A) and (B).

37. *Id.* at § 3730(c).

38. *Id.* at § 3730(b) (5). Private enforcement under the FCA is not meant to produce class actions or multiple separate actions based on identical facts and circumstances. *Supra* note 2, at 5290.

39. 31 U.S.C. § 3730(c) (1).

40. *Id.* at § 3730(c) (2) (A).

41. *Id.* at § 3730(c) (2) (B). Congress did not intend for hearings on the propriety of dismissals or settlements to be a matter of right, because of the risk of unnecessary delays. Rather, evidentiary hearings should be granted where the relator shows a "substantial and particularized need" for a hearing, such as a colorable claim that the settlement or dismissal is unreasonable, the Government has failed to investigate fully, or the Government's decision was based on arbitrary and improper considerations. *Supra* note 2, at 5291. The Government may also choose to handle the case through any available "alternate remedy," such as an administrative proceeding, to pursue monetary damages. In that event, the relator would have the same rights as in judicial proceedings. 31 U.S.C. § 3730(c) (5).

42. 31 U.S.C. § 3730(c) (2) (C). Such limitations may also result from a similar showing by the defendant. *Id.* at § 3730(c) (2) (D).

43. *Id.* at § 3730(c)(3).

44. *Id.* at § 3730(c) (4).

45. *Id.* at § 3733(a) (1). The FCA contains detailed requirements and procedures for CIDs and

The FCA provides that no action may be brought more than six years after the date of the violation or more than three years after the date when the "facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act," whichever occurs last. However, in no case can an FCA action be brought more than ten years after the violation.⁴⁶ The standard of proof, both as to all essential elements of the violation and as to damages, is preponderance of the evidence.⁴⁷

V. RECENT CASE LAW

In the wake of the 1986 amendments, a predictable upsurge in FCA actions, particularly *qui tam* suits, engendered considerable fodder for the federal courts to digest. This section of the article will summarize the trends evident in the case law.

A. Constitutionality

In some instances, there have been full, multi-pronged assaults on the constitutionality of the FCA *qui tam* provisions themselves.⁴⁸ For example, in *United States ex. rel. Stillwell v. Hughes Helicopters, Inc.*,⁴⁹ and *United States ex. rel. Newsham v. Lockheed*,⁵⁰ the *qui tam* portions of the FCA withstood challenges on separation of powers, appointments clause, and standing grounds. In each case, the defendants moved to dismiss *qui tam* actions on three bases. First, they claimed the 1986 *qui tam* provisions improperly place prosecutorial functions in the hands of private persons, thereby intruding on the province of the executive branch, in violation of the separation of powers doctrine.⁵¹ Second, they asserted that the 1986 amendments impermissibly appoint *qui tam* relators as "inferior officers" of the United States, giving them the executive authority to prosecute alleged violations of the FCA, in contravention of the appointments clause.⁵² Third, they claimed that *qui tam* relators lack standing to pursue their actions, having suffered insufficient injury-in-fact, thereby violating the "case or controversy" provisions of the Constitution.⁵³

With regard to the separation of powers challenge, *Hughes* noted the First Congress' incorporation of the *qui tam* concept into American law. This was taken as an indication that *qui tam* actions are consistent with the Constitution, which was developed and ratified approximately contemporaneously by many of the same men.⁵⁴ Further, both

responses thereto, along with exemptions for certain "protected material or information." See generally *id.*, at § 3733.

46. *Id.* at § 3731 (b) (1) and (2).

47. *Id.* at § 3731(c). Prior to the 1986 amendments, the FCA did not expressly state the burden of proof. Some case law had required the Government to prove its case by clear and convincing evidence or some variant thereof, based on the premise that the FCA is penal in nature. See *United States v. Shapleigh*, 54 F.2d 126 (8th Cir. 1893) and *United States v. Ueber*, 299 F.2d 310 (6th Cir. 1962). But see *Federal Crop Insurance Corp. v. Hester*, 765 F.2d 723 (8th Cir. 1985). Thus Congress clarified the standard to resolve the confusion resulting from this split of authority. *Supra* note 2, at 5295-96.

48. Opposition to *qui tam* actions is as old as the actions themselves. In 17th century England, for example, Lord Coke argued that *qui tam* statutes improperly delegated executive authority to private citizens, stating, in his Third Institute of the Laws of England, "The King cannot commit the sword of his justice or the oil of his mercy concerning any penal statute to any subject." Hurst, *The Common Informer*, 147 CONTEMPORARY REV. 189, 189-90 (1935).

49. 714 F. Supp. 1084 (C.D. Cal. 1989).

50. 722 F. Supp. 607 (N.D. Cal. 1989).

51. U.S. CONST. art. II, § 3.

52. U.S. CONST. art. II, § 2.

53. U.S. CONST. art. III.

54. 714 F. Supp. at 1086. See *Marsh v. Chambers*, 463 U.S. 783, 790 (1983): "[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on

Hughes and *Lockheed* found sufficient executive branch, i.e., DOJ checks on the actions of *qui tam* relators so as to be consistent with separation of powers doctrine.⁵⁵

As for the appointments clause issue, both courts noted that relators are not actually appointed "inferior officers" of the Government. As indicated in *Hughes*, relators have limited powers, no formal duties, hold no established office, have no prescribed tenure, and receive no federal pay, and thus are more properly considered agents of the Government rather than officers.⁵⁶ Additionally, the *Hughes* court relied on the lengthy list of holdings recognizing the authority of Congress to authorize citizen enforcement actions if it believes they would promote effective law enforcement.⁵⁷

Finally, on the standing challenge, both courts recognized Congressional power to create a legal interest and confer standing to assert that right. The constitutionally mandated injury-in-fact in such cases comes from the public/governmental interest rather than individualized, particularized injury.⁵⁸ Again, the courts pointed to a long history of judicial approval of statutory grants of standing.⁵⁹

how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent."

55. 714 F. Supp. at 1088-93 and 722 F. Supp. 611-13. See also *Morrison v. Olson*, 487 U.S. _____. 101 L. Ed. 2d 569, 108 S.Ct. 2597 (1988), where the Court upheld, over a separation of powers challenge, the independent counsel provision of the Ethics in Government Act 28 U.S.C. §§ 592(c) (1), 597(a) (Supp. 1987). It would seem that the executive branch retains at least as much control over *qui tam* relators as it does over independent counsel.

56. 714 F. Supp. at 1094. See also *Auffmordt v. Hedden*, 137 U.S. 310 (1890), wherein the Court held that one whose "position is without tenure, duration, continuing emolument or continuous duties, and [who] acts only occasionally and temporarily . . . is not an 'officer' within the meaning of the [Appointments Clause]." *Id.* at 327. The courts in *Hughes* and *Lockheed* rejected the contention that *Buckley v. Valeo*, 424 U.S. 1 (1976), required the conclusion that *qui tam* relators are improper "officers." In *Buckley*, the Court had declared that "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights . . . may be discharged only by persons who are 'Officers of the United States' within the language of [the Appointments Clause]." 424 U.S. 1 at 140. Unlike the members of the Federal Elections Commission at issue in *Buckley*, a *qui tam* relator

is not appointed by Congress, receives no federal salary and serves for no specified term. Furthermore, the *qui tam* plaintiff is not vested with the "primary responsibility" to enforce the False Claims Act on behalf of the United States, but instead, is involved in an individual case. Finally, the relator is not charged by Congress with setting the false claims policy of the United States, but merely is given a right to sue—a right that can be limited in all substantive respects by the executive branch.

714 F. Supp. at 1095. See also *NRDC v. Outboard Marine Corp.*, 692 F. Supp. 801 (N.D. Ill. 1988); *Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 652 F. Supp. 620 (D. Md. 1987); and *Melcher v. Federal Open Market Committee*, 644 F. Supp. 510 (D.D.C. 1986), *aff'd on other grounds*, 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988) for the principle that *Buckley* does not bar private citizen enforcement of public rights.

57. 714 F. Supp. at 1095.

58. See generally Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988); Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); and Currie, *Misunderstanding Standing*, SUP. CT. REV. 41 (1981).

59. 714 F. Supp. at 1096-99 and 722 F. Supp. at 613-15. On Congressional power to create standing, see *United States v. Richardson*, 418 U.S. 166, 193, 196, n.18 (1974) (Powell, J., concurring): "The Court has confirmed the power of Congress to open the federal courts to representatives of the public interest through specific statutory grants of standing." See also *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942); and *Associated Industries v. Ickes*, 134 F.2d 694 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943). In *Associated Industries*, the court stated:

Congress . . . can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding . . . Instead of designating the Attorney General . . . to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit . . . even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.

The United States Supreme Court has never expressly ruled on the constitutionality of the *qui tam* provisions of the FCA.⁶⁰ The FCA has been in issue on occasion, but the validity of the *qui tam* sections as such has not. Most recently, in *United States v. Halper*,⁶¹ the Court held that under the double jeopardy clause a defendant who had already been punished in a criminal action may not also be subjected to a civil sanction to the extent it constitutes punishment rather than a remedial measure. Because of the FCA's imposition of double (now treble) damages, the Court found that in some circumstances its civil sanctions would be more for deterrence or retribution than to make the Government whole. Therefore, they could not be combined with criminal penalties arising out of the same misconduct.⁶² However, the Court simply mentioned the *qui tam* provisions, noting that their possible implication of double jeopardy problems was not in issue in the instant case.⁶³ It is likely, but not certain, that the Court would uphold *qui tam* actions under the FCA on constitutional grounds if required to decide the point in a future case.⁶⁴

B. Government Employees as Relators

A major change effected by the 1986 amendments to the FCA was the apparent removal of the jurisdictional bar to *qui tam* actions brought by government employees.⁶⁵ The current version of the FCA does prohibit *qui tam* actions "brought by a former or current member of the armed forces . . . against a member of the armed forces arising out of such person's service in the armed forces,"⁶⁶ and *qui tam* suits brought against a member of Congress or of the judiciary or "senior executive branch official" if the action is based on information already known to the Government.⁶⁷ But aside from these exceptions, the door may now be open for government employees to serve as relators.

In *Erickson ex rel. United States v. American Institute of Bio. Sciences*,⁶⁸ the court, in dictum, traced the history of the FCA and noted the effect of the 1986 amendments.

134 F.2d at 704 (footnote omitted).

There is, however, authority to the contrary, such as *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979):

Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one "who otherwise would be barred by prudential standing rules." In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered "a distinct and palpable injury to himself," that is likely to be redressed if the requested relief is granted.

Id. at 100 (citations omitted). See also *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1981).

60. Unpublished lower court decisions upholding provisions of the FCA on constitutional grounds include *Truong v. Northrop Corp.*, No. 88-967 MRP (C.D. Cal. 11 Aug. 1989) and *United States v. Lockheed Missiles & Space Co.*, No. C 88-20009 RPA (N.D. Cal. 10 July 1989).

61. 490 U.S. ___, 104 L.Ed. 2d 487, 109 S. Ct. ___ (1989).

62. *Id.*, 104 L.Ed. 2d at 502.

63. *Id.* at 503-04, n. 11. See also *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) where the *qui tam* provisions of the FCA were in issue, but their constitutionality was not challenged.

64. For a detailed analysis of this question, see Caminker, *supra* note 5. See also Note, *Qui Tam Suits Under Federal False Claims Act: Tool of the Private Litigant in Public Actions*, 67 NW. U.L. Rev. 446 (1972); and Graham, *The Qui Tam Amendments: Privatizing the Civil Prosecution Function*, 49 Fed. Cont. Rep. (BNA) No. 659 (Apr. 4, 1989).

65. Rather than an explicit exclusion, the 1943 version of the FCA contained a *de facto* bar on such actions, in the form of the provision disallowing jurisdiction over private *qui tam* suits (i.e., not taken over by the Government. See *United States v. Pittman*, 151 F.2d 851 (5th Cir. 1946)) based on information already in the possession of the Government. See *supra* note 2, at 5277-78.

66. 31 U.S.C. § 3730(e) (1) (emphasis added).

67. *Id.* at § 3730(e) (2) (A) and (B).

68. 716 F. Supp. 908 (E.D. Va. 1989).

After noting that the amendments only exclude certain specifically enumerated classes of relators rather than all government employees, the court stated, "[I]n striking contrast to the 1943 revision, the 1986 revision does not have the effect of a blanket exclusion of all government employees. On the contrary, the 1943 language barring *qui tam* suits by government employees was deleted."⁶⁹

The court also found that Congressional intent "could not be clearer: Encourage more *qui tam* suits by expanding the universe of potential relators."⁷⁰ Thus, *Erickson* opined that there is no longer any bar on *qui tam* actions by government employee relators, with the exception of the narrow limitations specified in the FCA. Although this analysis seems consistent with accepted methods of statutory construction and the legislative history,⁷¹ it remains to be seen how other courts will view this issue.

For example, in *United States ex rel. LeBlanc v. Raytheon Co.*,⁷² the court disagreed with the *Erickson* reasoning, and ruled that 31 U.S.C. § 3730(e) (4) prohibits suits by government employees based on information acquired on the job. Opining that government employees maintain a dual status — the arms of the Government while at work, private citizens while not at work — the court found that a "public disclosure" of information necessarily occurs whenever a government worker learns of information in the course of performing official duties. Moreover, such persons cannot qualify for the "original source" exception to the public disclosure rule⁷³ in that they are government employees whose responsibility it is to uncover such information. Because, as a condition of their employment, government workers must gain such information, the fruits of their efforts belong to the Government, not to the individuals. The court further indicated that, inasmuch as their official duties call for the gathering of information concerning fraud against the Government, such relators do not provide information to the Government "voluntarily," within the meaning of the original source exception. The court concluded that 31 U.S.C. § 3730(e) (4) must be interpreted to bar all *qui tam* suits based on government information unless the relator acquired the information in his private capacity.

69. *Id.* at 913-14, 918. "The inference invited by Congress' choice on structure is compelling: Government employees are included in the general universe of permissible *qui tam* plaintiffs unless, in the particular circumstances, they fall into one of the four specifically defined excluded groups." *Id.*, at 913 (footnote omitted). For example, the court found significant the language of 31 U.S.C. § 3730 (e) (1), which bars suits by military members against other military members. "This provision is pregnant with the implication that armed forces members may bring *qui tam* suits against non-members of the armed forces." *Id.* (footnote omitted). The exclusion of *qui tam* actions against members of Congress, judges, and senior executive branch officials based on information known to the Government similarly implied that government employees may bring action against other defendants based on governmental information. *Id.* at 914. In fact, this exclusion (31 U.S.C. § 3730(e) (2) (A)) contains the identical language used in the 1943 amendments effectively to bar all *qui tam* suits by government employees. In stark contrast, the 1986 amendments include this phrase only in this single exclusion rather in the statute as a whole. *Id.* n. 10. Also, *Erickson* cited the legislative history for the proposition that the FCA's whistle-blower protections apply to public as well as private sector employees. Protection for governmental whistle-blowers would have been "unnecessary and inappropriate" if they were barred from bringing action. *Id.* The court noted that "the legislative history is replete with discussions of problems government employees face as whistle-blowers . . ." *Id.*, n. 11. Indeed, Congress referred to a study of some 5000 federal government employees to determine the extent to which observed fraud went unreported. The study found 69 percent of federal workers with direct knowledge of illegalities failed to report it, and, of those, 37 percent remained silent for fear of reprisals. *Supra* note 2, at 5269-70.

70. 716 F. Supp. at 918. "[W]hen Congress includes limiting language in a previous version of a statute and subsequently deletes it, the previously existing limitation is no longer part of the statute." *Id.*

71. *Id.* at 912-18.

72. D.C. Mass., No. 88-2363-T, (25 Jan. 1990), 58 U.S. L. W. 2472, (29 Feb. 1990).

73. 31 U.S.C. § 3730(e) (4) (A) and (B).

However, *LeBlanc* seems to give an excessively expansive reading of the statute. The FCA specifically refers to "public disclosure or allegations or transactions in a criminal, civil, or administrative hearing, in a congressional administration or General Accounting Office report, hearing, audit, or investigation, or from the news media."⁷⁴

It does not, on its face, bar *qui tam* actions based on information garnered by a government employee in the course of official duties by defining such information as *per se* publicly disclosed. In this author's view, *Erickson* correctly interprets the meaning of the statute in light of its history and in view of the clearly expressed intent of Congress to expand the pool of potential information sources.

C. Retroactivity of 1986 Amendments

There has been a considerable amount of litigation concerning the issue of whether the 1986 amendments apply retroactively, both as to false claims submitted and litigation commenced prior to the effective date of the amendments. The amendments took effect as of the date of their enactment, 27 October 1986, but are silent as to retroactivity. Because of the important changes they effected, *e.g.*, eliminating the requirement of proving specific intent to defraud, broadening the potential pool of relators, and providing for treble rather than double damages, the issue has been hotly contested.

Generally, the courts finding retroactivity have first noted the absence of any guidance in the FCA itself, and the lack of any discussion of retroactivity in the legislative history.⁷⁵ Next, they recognize the *Bradley* rule, *i.e.*, the "principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in a manifest injustice or there is statutory direction or legislative history to the contrary."⁷⁶

In *United States v. Hill*,⁷⁷ the court analyzed the issue in detail. Initially, it determined that retroactive application would serve the amendments' purposes of deterring fraud through increased penalties, enhancing private citizen assistance in curbing fraud, and expressly defining the standard of liability, *e.g.*, the absence of any requirement to prove actual knowledge on the part of the defendant.⁷⁸ Next, the court evaluated the case in light of "the three *Bradley* factors," *i.e.*, the nature and identity of the parties, the nature of their rights, and the nature of the impact on the change in the law upon those rights.⁷⁹

The court considered the first factor to weigh heavily in favor of retroactivity, in light of the "paramount national concern" in the areas of fraud against the Government.⁸⁰ The second factor also favored retroactive application, because it

cannot be said that the defendants have a 'matured' or 'unconditional' right to double, rather than treble damages, or to a \$2,000 forfeiture, rather than a forfeiture ranging from \$5,000 to \$10,000. . . . Nor is it plausible to contend that the defendants had a 'vested right' in any particular standard of liability.⁸¹

74. *Id.* at § 3730(e) (4).

75. See *United States ex rel. LaValley v. First Nat'l Bank of Boston*, 707 F. Supp. 1351 (D. Mass. 1988) and *United States ex rel. McCoy v. Cal. Med. Review, Inc.*, 723 F. Supp. 1363 (N.D. Cal. 1989).

76. *Bradley v. School Board of City of Richmond*, 416 U.S. 696, at 711 (1974).

77. 676 F. Supp. 1158 (N.D. Fla. 1987).

78. *Id.* at 1167-68.

79. *Id.* at 1168. The court stated that no single factor is dispositive, and that they serve merely to focus in on the underlying concern, *i.e.*, whether the disappointment of private expectations caused by retroactive application will outweigh the public interest in enforcement of the new rule.

80. *Id.* at 1169.

81. *Id.* (citations omitted).

Finally, the 1986 amendments were deemed not to prohibit anything that was previously lawful. The court acknowledged that deletion of any requirement of proving specific intent to defraud brought "less culpable conduct within the ambit of the law," and perhaps could be construed as imposing an "unanticipated obligation" upon the defendants. But the court found no evidence of defendants' justified reliance on the former law, and hence no manifest injustice in retroactive application.

[I]t strains credulity to believe that had [defendants] known of the amendments, they would not have submitted false statements. . . . To entertain this assumption would be to conclude that the defendants, who indisputably engaged in criminal conduct, would have done otherwise had they known they could be held civilly liable without a showing of specific intent to defraud. In fact, without a plausible suggestion of likely significant and justified reliance on the prior law, a party cannot avail itself of the third *Bradley* factor, and also falls outside the scope of other canons of statutory construction that may disfavor retroactivity.⁸²

The trend has been for the courts to conclude that the 1986 amendments should apply retroactively, although there is some authority to the contrary.⁸³ As a further complicating factor, the court in *United States v. Milford*⁸⁴ held that FCA suits based on DOD contracts are governed by the DOD Authorization Act of 1986.⁸⁵ That statute provided that,

82. *Id.* at 1170 (citations omitted). The court also disposed of defendants' argument that the rationale of *Griffon v. United States Department of Health and Human Services*, 802 F.2d 156 (5th Cir. 1986) should block retroactive application. In *Griffon*, the defendant was fined under the Civil Monetary Penalties Law (CMPL), 42 U.S.C. § 1320a-7a for submitting false claims in 1979, but CMPL was not enacted until 1981. CMPL empowers the Secretary of HHS to implement and enforce the law, which provides liability for claims the person knew or had reason to know were not allowed. The Secretary applied CMPL retroactively, but only to conduct that would have violated the FCA. The appellate court found this improper, in that the new CMPL standard of liability (*i.e.*, knew or should have known) was a substantive change of sufficient magnitude to bar retroactive application to defendant's false claims. However, the *Hill* court again pointed out that the 1986 amendments to the FCA did not effect such a major change in the standard of liability so that a defendant would have altered his conduct had he known of the amendments. Also, the court criticized *Griffon* for failure explicitly to consider the *Bradley* factors. *Id.*, at 117-72. See also *Kelsoe v. Federal Crop Ins. Corp.*, 724 F. Supp. 448, 452 (E.D. Tex. 1988) and *United States ex rel. Stinson v. Provident Life*, 721 F. Supp. 1247 (S.D. Fla. 1989) for a similar refusal to apply the *Griffon* rule to the FCA amendments.

83. Decisions finding in favor of retroactivity include *United States v. Pani*, 717 F. Supp. 1013 (S.D.N.Y. 1989); *Gravitt v. General Electric Corp.*, 680 F. Supp. 1162 (S.D. Ohio 1988) *appeal dismissed*, 848 F.2d 190 (6th Cir. 1988), *cert. denied*, 102 L.Ed. 2d 239 (1988); *United States ex rel. Stinson v. Provident Life*, 721 F. Supp. 1247 (S.D. Fla. 1989); *United States ex rel. McCoy v. Cal. Med. Review, Inc.*, 723 F. Supp. 1363 (N.D. Cal. 1989); *United States v. Hill*, 676 F. Supp. 1158 (N.D. Fla. 1987); *United States ex rel. LaValley v. First Nat'l Bank of Boston*, 707 F. Supp. 1351 (D. Mass. 1988); *United States v. Oakwood Downriver Medical Center*, 687 F. Supp. 302 (E.D. Mich. 1988); *United States v. Ettrick Wood Prods.*, 683 F. Supp. 1262 (W.D. Wis. 1988); *Kelsoe v. Federal Crop Ins. Corp.*, 724 F. Supp. 448 (E.D. Tex. 1988); *United States v. Board of Educ. of Union City*, 697 F. Supp. 167 (D.N.J. 1988); and *United States v. Rockwell International Corp.*, 730 F. Supp. 1031 (D. Colo. 1990). See also *Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp. 795 (D. Utah 1988). The only published opinion to the contrary is *United States v. Bekhrad*, 672 F. Supp. 1529 (S.D. Iowa 1987), in which the court, without much analysis, held that retroactivity would impermissibly create a new liability in connection with a past transaction. Unpublished decisions denying retroactive application include *United States ex rel. Boisvert v. F.M.C. Corp.*, No. C-86-20613 WAI (unpublished order of 9 Sept. 1987) (N.D. Cal.); *United States ex rel. Hyatt v. Northrup Corp.*, No. CV 86-6437-KN, 1988 WL 156739 (unpublished order of 31 Mar. 1988) (C.D. Cal.); and *United States v. Green Constr. Co.*, No. A86-263 Civil (unpublished order of 12 Nov. 1987) (D. Alaska). See generally Waldman, *The 1986 Amendments to the False Claims Act: Retroactive or Prospective?* 18 PUB. CONT. L.J. 469 (June 1989).

84. Unpublished order of 2 April 1990, M.D.Ga., Civ. No. 88-29-ATH (DF).

85. Pub. Law No. 99-145, 931(b), 99 Stat. 699.

Notwithstanding section 3729 of title 31, United States Code, the amount of the liability under that section in the case of a person who makes a false claim related to a contract with the Department of Defense shall be a civil penalty of \$2,000, an amount equal to three times the amount of the damages the Government sustains because of the act of the person, and costs of the civil action.

Congress made this increase in the damages multiplier prospective, in that it applied to claims made or presented on or after 8 November 1985.⁸⁶ The court found that the subsequent 1986 amendments to the FCA, which were silent as to this earlier "explicit provision" regarding DOD contracts, did not overrule it. Thus, a person who had submitted a false claim prior to 8 November 1985 was held not subject to the increased civil penalties established in either the 1986 DOD Authorization Act or the 1986 FCA amendments. Given the possibility of FCA actions up to ten years after the date of the violation, this will be a fertile area for further litigation for some time to come.

D. Original Source Issues

In *Houck ex rel. United States v. Folding Carton Administration*⁸⁷ and *United States ex rel. Dick v. Long Island Lighting Co.*,⁸⁸ the courts applied the 1986 amendments to dismiss suits brought by *qui tam* plaintiffs. In both cases, the relators had brought action based upon information that had been publicly disclosed. In *Houck*, the information came from previous litigation that resulted in a reported case, and in *Dick* the sources included the news media and various documents on file in the courthouse. The relators were not the "original source" of the publicly disclosed information forming the basis for their *qui tam* actions, and thus were barred from bringing the action.⁸⁹

The *Dick* court, in *dictum*, left the door open for some flexibility in this regard. "There may, for example, be instances where prior knowledge was not assimilated at government decision making levels and bureaucrats, by design or through bungling, were allowing cheats to escape government recoupment."⁹⁰ But the court found this not to be true in the instant case; the *qui tam* action had accomplished nothing and had not contributed in any way to the Government's recovery of damages.

In contrast, the court in *United States ex rel. Stinson v. Provident Life*⁹¹ found that the relator qualified as an "original source" of publicly disclosed information. Relying on language from the *Houck* opinion, the court held that the relator had derived at least some of the key information in an "independent and direct" manner, and was, therefore, not barred from bringing the *qui tam* action.⁹²

Public interest organizations may attempt to bring or assist in various *qui tam* actions as part of their political agenda. However, in *United States v. Rockwell International Corp.*⁹³ one such group found itself dismissed as a party plaintiff. Taxpayers Against Fraud (TAF), a nonprofit corporation, learned about the defendant's alleged wrongful activities from another plaintiff, and subsequently joined in his *qui tam* action. Although it filed suit before public disclosure of the information, the court held that, because TAF was not an original source, the FCA⁹⁴ blocked it from

86. *Id.*, § 931(c); 99 Stat. 583.

87. 881 F.2d 494 (7th Cir. 1989).

88. 710 F. Supp. 1485 (E.D.N.Y. 1989).

89. 31 U.S.C. § 3730(e) (4) (A) and (B).

90. 710 F. Supp. at 1486.

91. 721 F. Supp. 1247 (S.D. Fla. 1989).

92. *Id.* at 1257-58.

93. 730 F. Supp. 1031 (D. Colo. 1990).

94. The court relied on 31 U.S.C. § 3730(e) (4) (A) to find TAF an improper plaintiff. TAF had no direct and independent knowledge of the information prior to filing suit; it had simply been told of the

serving as plaintiff. The court allowed the "original source" plaintiff to continue with the action alone.

VI. IMPLICATIONS FOR THE MILITARY

Fraud against the Department of Defense (DOD) was a major catalyst in moving Congress to amend the FCA. The highly publicized defense contractor scandals demanded a strong response, and Congress intended the revitalized *qui tam* provisions of the FCA to be an important boon to the anti-fraud forces.⁹⁵ By removing the jurisdictional bar to *qui tam* suits based on information already in the "possession" of the Government, Congress envisioned a vastly increased number of eyes and ears ever-vigilant for fraudulent conduct. Particularly if the 1986 amendments are read to allow suits by government employees, including members of the Armed Forces, based on information collected during the performance of their official duties, the intent of Congress could be satisfied beyond its wildest dreams.⁹⁶

This question of whether *qui tam* actions may now be brought by government employees based on information gleaned on the job will be the most significant factor in determining the impact of the 1986 amendments on the military. Because the FCA does not clearly, specifically allow or forbid such suits *per se*, and the legislative history fails to address the issue directly, there is room for argument.⁹⁷

On equitable grounds, it seems unfair to allow a government employee relator to claim up to thirty percent of a recovery based on fraud against the Government discovered pursuant to the worker's official duties. In addition to allowing the relator to be paid, in a sense, twice for the same work, it could lead to a major distractor that might adversely affect duty performance. These were some of the concerns that led to the 1943 amendments.⁹⁸ On the other hand, in passing the 1986 amendments, Congress perceived a need to coax a greater number of potential informants to come from behind their desks and bring forth evidence of fraud against the Government. Much more important than "setting a rogue to catch a rogue,"⁹⁹ *qui tam* awards may induce honest but reluctant individuals to come forward with evidence. For whatever reason, official government investigators and

facts by the "original source" plaintiff, Mr. Navarette. Although TAF had not derived its knowledge from a public source, the court seemed to believe that the subsequent public disclosure and TAF's lack of direct and independent knowledge of the misconduct at the time it filed suit placed it afoul of the original source rule. This conclusion, if adopted by other courts, would serve as a significant obstacle to *qui tam* actions. In cases where DOJ declines to intervene, many relators would lack the resources to proceed, absent assistance from an organization such as TAF.

95. *Supra* note 2, at 5267-73. The legislative history mentioned 2311 DOD fraud investigations conducted in 1984 alone, and the fact that in 1985, 45 of the 100 largest defense contractors (including 9 of the top 10) were under investigation for multiple fraud offenses. *Id.* at 5267. Congress estimated the annual loss from the DOD procurement budget at up to \$10 billion. *Id.* at 5268.

96. The FCA bars *qui tam* actions by current or former military members, but *only* in suits against other members of the Armed Forces arising out of the relator's military service. 31 U.S.C. § 3730(e) (1). "This provision only prohibits servicemen and women from suing *each other* under the False Claims Act and in no way exempts them from liability under the act if the government brings an action against them." *Supra* note 2, at 5294 (emphasis added). If the rationale of *Erickson*, 716 F. Supp. 908 (E.D. Va. 1989) becomes the national trend, the door is open for *qui tam* actions by government employees based on information gathered in the course of their official duties. *But see United States ex rel. LeBlanc v. Raytheon Co.*, No. 88-2363-T (D. Mass.) (25 Jan. 1990) 58 U.S.L.W. 2472 (20 Feb. 1990).

97. *See Erickson ex rel. United States v. American Institute of Bio. Sciences*, 716 F. Supp. 908 (E.D. Va. 1989) and *United States ex rel. LeBlanc v. Raytheon Co.*, No. 88-2363-T (D. Mass.) (25 Jan. 1990) 58 U.S.L.W. 2472 (20 Feb. 1990).

98. *See Erickson ex rel. United States v. American Institute of Bio. Sciences*, 716 F. Supp. 908, n.18 (E.D. Va. 1989).

99. *Supra* note 9.

litigators alone were not adequately fighting the battle.¹⁰⁰ Perhaps Congress viewed the "loss" of some share of the recovery as a reasonable transaction cost and a prerequisite to luring more information-bearers to come forward.¹⁰¹ After all, the Government would still have at least seventy percent of the proceeds, as opposed to the zero percent it would have had absent the relator's efforts.

In cases of a large-scale fraud, the prospect of receiving up to thirty percent of a treble damages award should certainly be sufficient to "encourage any individual knowing of Government fraud to bring that information forward."¹⁰² Coupled with the new safeguards designed to protect "whistle-blowers" from reprisals, the potentially gigantic monetary rewards are a powerful inducement. As word of this new way of "doing well by doing good" spreads through the popular media,¹⁰³ the possibility of the proverbial torrent of litigation increases. It is a fair assumption that the people who work on a daily basis with the subject matter are most likely to learn of fraud against the Government,¹⁰⁴ and so people within the defense contracting system are primary beneficiaries of the new *qui tam* provisions. Whether military members, civil service employees, or individuals working for the contractors, the number of possible informants has been greatly expanded. In this regard, Congress has succeeded in realizing one of the main goals of the 1986 amendments.

However, when an informant becomes a *qui tam* relator, the Government pays a substantial price for the information, regardless of its quality. Because the DOJ has sixty days from receipt of the complaint and supporting evidence to decide whether to intervene, there is pressure to investigate each new case as soon as possible, while ensuring that the intervention window does not slam shut on slightly older cases.¹⁰⁵ Although courts may be liberal in granting extensions,¹⁰⁶ the process of researching and analyzing *qui tam* complaints under time constraints can force the DOJ to shuffle its priorities and divert its investigative resources away from areas where the DOJ might prefer to use them.

In addition, a *qui tam* action may surface at a suboptimal point in time from the Government's perspective. When unfettered by private enforcement actions, the DOJ is generally free to choose the most advantageous moment to initiate proceedings.

For example, the DOJ might wish to delay civil prosecution of a particular fraudulent practice until after it had more time to investigate the facts, or until after it had brought criminal or administrative proceedings against the wrongdoer (and maybe even only if such proceedings were unsuccessful), or until after it had been able to establish judicial precedent in another case with a more favorable factual background or procedural posture. By dictating the forum and timing of an enforcement action against a particular false claims practice, initiation of a *qui tam* suit might lead to a resolution of that particular case which is less than optimal from the executive's point of view.¹⁰⁷

100. *Supra* note 2, at 5267-69.

101. *Id.* at 5266-67, 5273, 5288-89.

102. *Id.* at 5266-67. "[O]nly a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds." *Id.*, at 5267.

103. See France, *The Private War on Pentagon Fraud*, ABA Journal, 46-49; (March 1990); Stevenson, *Workers Who Turn in Bosses Use Law to Seek Big Rewards*, N.Y. Times, 10 July 1989 at A1, col. 1, D3, col. 1 (which reported that the DOJ had intervened in *qui tam* actions against Singer Corp. for \$77 million, Litton Industries for \$25 million and Northrop Corp. for \$20 million, all of which were single rather than treble damages). Dreyfus, *Blowing the Whistle for Hefty Profit*, Los Angeles Times, 17 Sept. 1986, sec. 1 at 1, col. 1. See generally R. Oparil, *The Coming Impact of the Amended False Claims Act*, 22 AKRON L.REV. 525 (Spring 1989).

104. "Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity. Yet in the area of Government fraud, there appears to be a great unwillingness to expose illegalities." *Supra* note 2, at 5269.

105. See 31 U.S.C. § 3730(b) (2).

106. Congress intended extensions to be allowed only sparingly. See *supra* note 2, at 5289-90.

107. Caminker, *supra* note 5, at 360-61 (footnote omitted).

The relator would be oblivious to such considerations, and the result of the *qui tam* action might, therefore, be less favorable than if the DOJ had been able to determine the timing of the suit.

In discussing these administrative and tactical concerns, it is important to note that the subject area for *qui tam* complaints is not limited to procurement fraud,¹⁰⁸ although that alone would be enough to monopolize the attention of a great number of DOJ attorneys. For example, the door is open for *qui tam* suits predicated upon violation of federal environmental statutes as well. The Federal Acquisition Regulation (FAR) mandates inclusion of the following clause in an expansive category of government contracts.

(b) The Contractor agrees — (1) To comply with all requirements of section 114 of the Clean Air Act (42 U.S.C. 7414) and section 308 of the Clean Water Act (33 U.S.C. 1318) relating to inspection, monitoring, entry, reports, and information, as well as other requirements specified in section 114 and section 308 of the Air Act and the Water Act, and all regulations and guidelines issued to implement those acts before the award of this contract; . . . (3) To use best efforts to comply with clean air standards and clean water standards at the facility in which the contract is being performed . . .¹⁰⁹

Thus, a violation of these contractual provisions might be considered a false claim against the Government, within the meaning of the FCA, when a contractor, *e.g.*, requests payment for work performed and has not complied with the applicable environmental requirements.¹¹⁰ As a result, both of the twin plagues of the DOD, procurement fraud and environmental compliance, may now be brought to the doorstep of the DOJ by *qui tam* relators.

The upsurge in *qui tam* actions, hoped for by Congress and dreaded by the DOJ, seems to be materializing. As of 28 February 1990, 294 *qui tam* actions under the FCA have been filed with the DOJ since the effective date of the 1986 amendments. This is a dramatic increase from the six *qui tam* cases per year that crossed DOJ desks during the pre-1986 amendment years. Of those 294 cases, DOJ has intervened in twenty-nine actions, declined to intervene in 120, and 145 remain pending and/or are still under seal.¹¹¹ A total of \$27.1 million has been recovered, and the largest

108. 31 U.S.C. § 3729(a) is sufficiently broad in its language to encompass a wide range of "false claims." However, its scope is not limitless. As noted previously, the FCA does not apply to unpaid taxes. See *supra* note 18. Additionally, there is a substantial body of case law pertinent to the issue of what constitutes a false claim. As stated in *United States v. McNinch*, 356 U.S. 595, 599 (1958), it is "clear that the False Claims Act was not designed to reach every kind of fraud practice on the Government." There the Court held that the FCA does not govern an application for credit insurance. Similarly, in *United States ex rel. Simmons v. Smith*, 629 F. Supp. 124 (S.D. Ala. 1985), fraudulent actions without actual claims upon and harm to the United States Treasury were held not to be reached by the FCA. See also *United States v. Bornstein*, 423 U.S. 303 (1976); *United States v. Cochran*, 235 F.2d 131 (5th Cir. 1956), *cert. denied*, 352 U.S. 941; and *United States v. Tieger*, 234 F.2d 589 (3d Cir. 1956), *cert. denied*, 353 U.S. 569.

109. FAR, Part 52, sec. 52.223-2.

110. It is, of course, essential that a "false claim" be involved, within the meaning of 31 U.S.C. § 3729(a). See *supra* note 100. In the area of environmental compliance, the contractor might "knowingly" but falsely certify that his work was performed in conformity with all applicable environmental standards as part of his demand for payment, thereby violating 31 U.S.C. § 3729(a) (2). There is at present no case law on this specific issue, however. For the proposition that "claim" should be expansively interpreted, see *United States v. Neifert-White Co.*, 390 U.S. 228 (1968). But see *United States ex rel. Weinberger v. Equifax, Inc.* 557 F.2d 456 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978). *Hansen v. National Commission on the Observance of International Women's Year*, 628 F.2d 533 (9th Cir. 1980).

111. Personal communication with Michael W. Robinson, Spokesman, DOJ Public Affairs (9 Mar. 1990).

single award to a *qui tam* relator has been approximately \$1.4 million (out of a total settlement of \$14.3 million), in early 1989.¹¹²

Once *qui tam* complaints are investigated, there seem to be adequate safeguards against frivolous or nuisance suits. The DOJ can intervene initially and settle¹¹³ or move to dismiss the action,¹¹⁴ although the relator may be entitled to a hearing before either move. Short of dismissal or settlement, either the DOJ or the defendant may move that the court limit the relator's participation in the litigation. This limitation is predicated upon a showing that the relator's unrestricted participation would be for purposes of harassment, would interfere with or unduly delay the DOJ's prosecution, or would cause the defendant undue burden or unnecessary expense.¹¹⁵ The DOJ may move to stay the relator's discovery actions, based on a showing that such discovery would interfere with a related government investigation or prosecution.¹¹⁶ Also, despite initial declination, the DOJ may still intervene in the action at a later date, upon a showing of good cause.¹¹⁷ Finally, in cases where DOJ does not intervene and the *qui tam* plaintiff pursues the case alone, "the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."¹¹⁸ Thus, Congress attempted to provide enough checks and balances in the 1986 amendments to prevent *qui tam* litigation from being misused as a weapon of vengeance or harassment by disgruntled employees or activists.

112. *Id.* The record recovery was in the case of United States *ex rel.* Butenkoff v. Industrial Tectonics, Inc., No. 86-CV-4078 (D. Mich.) (23 June 1989).

113. 31 U.S.C. § 3730(c) (2) (A). "The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion."

114. *Id.* at § 3730(c) (2) (B).

The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera."

115. *Id.* at § 3730(c) (2) (C) and (D).

116. *Id.* at § 3730(c) (4).

117. *Id.* at § 3730(c) (3). "When a person [the relator] proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause." Two questions concerning this provision remain unanswered. First, what would constitute "good cause" so as to permit DOJ intervention after a decision not to intervene? The legislative history says merely that,

Conceivably, new evidence discovered after the first 60 days of the litigation could escalate the magnitude or complexity of the fraud, causing the Government to reevaluate its initial assessment or making it difficult for the *qui tam* relator to litigate alone. In those situations where new and significant evidence is found and the Government can show 'good cause' for intervening . . . the court may allow the Government to take over the suit.

Supra note 2, at 5291-92.

Second, when DOJ does enter a case after initial declination, does the clause "without limiting the status and rights of the person initiating the action" mean that DOJ would lack its usual powers to settle or dismiss the case over the relator's objection? On this issue, the legislative history is silent.

118. 31 U.S.C. § 3730(d) (4). Congress

add this language in order to create a strong disincentive and send a clear message to those who might consider using the private enforcement provision . . . for illegitimate purposes. [Congress] encourages courts to strictly apply this provision in frivolous or harassment suits as well as any applicable sanctions available under the Federal Rules of Civil Procedure. Additionally, where the court determines that the private plaintiff is motivated by bad faith or bringing a clearly frivolous action, the court shall require the plaintiff to make assurances that payment of legal fees and expenses can be made before allowing litigation to proceed.

These same protections were important to the court in *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*¹¹⁹ as it turned aside constitutional challenges to the *qui tam* provisions. Both on separation of powers and appointment clause grounds, the statutory safeguards against "loose cannon" relator/plaintiffs were major factors indicating executive branch control of the litigation.¹²⁰ In addition, there are practical disincentives to meritless actions, as the court pointed out.

[A]lthough the statutory bounty provides a significant incentive to sue, the *qui tam* plaintiff faces often onerous litigation before realizing any recovery. As in this case, a false claims plaintiff will usually confront defendants with significant litigation coffers and access to preeminent legal talent. If the suit does proceed to trial, the plaintiff frequently is faced with a complex case requiring a substantial investment of time to plead and prove. If any award is finally gained, an immediate appeal is a strong likelihood. Thus, a plaintiff's lawyer in a false claims action, invariably working on a contingent fee basis, faces enormous practical disincentives to proceeding with the suit.¹²¹

While the burgeoning number of *qui tam* actions somewhat belies the efficacy of these supposedly formidable roadblocks, it is probably true that few weak cases will survive the initial stages of the process.

Therefore, the investigative burden should be the principal drawback to *qui tam* actions, insofar as the Government is concerned. When DOJ receives a complaint that involves the Air Force, this burden will then partially shift to Air Force shoulders as well. Within the time constraints during which DOJ must decide whether to intervene, Air Force attorneys will be involved in assisting DOJ to gather and verify information concerning the case. Because of the intricacies, both factual and legal, that entangle many procurement fraud and environmental compliance issues, this short-notice game of pre-litigation "Beat the Clock" could be a substantial drain on Air Force resources.

Mirroring events at DOJ, Air Force attorneys at headquarters, major commands, and on down to base level will be compelled by the *qui tam* sixty-day clock to give top priority to the new case on the table. Procedurally, the Air Force receives a copy of the complaint and a statement of material evidence from the DOJ Civil Division in every *qui tam* action involving the Air Force, along with a request for a recommendation as to whether the Government should intervene in the case. The Air Force Office of Special Investigation conducts a preliminary review and initiates a criminal investigation in appropriate cases, if the DOJ has not already done so. The Air Force determines whether it has any relevant information, and then provides its recommendation to DOJ.¹²² If the percentage of cases in which DOJ has intervened

Supra note 2 at 5294. Of course, even if the case is not so weak as to be frivolous or in bad faith, a relator faces powerful financial disincentives to bringing any action that does not have a substantial likelihood of success. The costs of conducting protracted, complex litigation against an opponent possessed of comparatively infinite resources would be overwhelming, should the relator fail to prevail in the action. Even if legal counsel were sought on a contingent fee basis, no law firm would make such a huge investment of time, money, and human effort without at least a reasonable prospect of victory. See Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 226 (1983).

119. 714 F. Supp. 1084 (C.D. Cal. 1989).

120. *Id.* at 1090-95.

121. *Id.* at 1091-92.

122. Personal communication with Mr. Kevin Vincent, Department of the Air Force, Office of the General Counsel, Washington D.C. (20 Mar. 1990) AUTOVON 225-5896.

holds firm, a large majority of the complaints will not lead to government prosecution of the case.¹²³ Thus, very often, much time, effort, and money will be expended on sifting a few viable cases from the remaining chaff.

Even after an initial declination of intervention, the investigative albatross may still return to its favorite position around the Government's neck. Because the Government is allowed to receive copies of all deposition transcripts during the relator's pursuit of the action,¹²⁴ there can be a continuing flow of new information as the case proceeds. Government attorneys will have to analyze this material and investigate new sources of information uncovered therein with a view to possible later intervention.

Military attorneys will serve in this evidence gathering, analysis, and evaluation process, but probably will not be involved in the actual litigation; that role will be reserved for the DOJ and/or the relator. Of course, to the extent the plaintiffs prevail, the Government will receive the lion's share of any recovery, and in this sense *qui tam* actions are for the Government's own good. The question is whether the benefits justify the administrative burden.

VII. CONCLUSION

The potential impact of *qui tam* actions under the FCA is just beginning to be felt. As more relators receive million-dollar awards, the resulting publicity should encourage more "white knights" to join the antifraud army Congress envisioned. While the administrative burden on DOJ and the various branches of the Armed Forces may be heavy, ultimately the relators and the Government should be allies, not adversaries. Some view *qui tam* suits as a "Trojan horse" attacking the Government from within under the guise of allegiance. But if the statutory safeguards against frivolous actions work as planned, *qui tam* suits may be the ultimate pro-government claim for many years to come.

123. As of 20 March 1990, DOJ had sought Air Force review of 37 *qui tam* actions following the effective date of the 1986 amendments. DOJ intervened in 12 cases and declined intervention in 9. The 16 remaining cases are still pending a decision on intervention. *Id.*

124. 31 U.S.C. § 3730(c) (3).

An Overview of the Federal Tort Claims Act

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I. BACKGROUND AND HISTORY

Congress enacted the Federal Tort Claims Act (FTCA)¹ in 1946 as a waiver of sovereign immunity permitting a limited but meaningful financial remedy for persons injured by negligent or wrongful acts or omissions of federal employees acting within the scope of their employment. Before this enactment, an individual had the unenviable choice of seeking recourse against the very limited financial resources of the employee-tortfeasor or applying for private relief directly to Congress. Neither route provided great expectation of success. Private relief bills, even in meritorious cases, fared poorly in Congress, which is ill-suited to investigate and adjudicate private claims properly.

After several piecemeal attempts to provide a meaningful legislative solution, Congress enacted the FTCA,² which provided that the United States could be sued in U.S. District Court, without any limitation as to amount of recovery, for personal injury, wrongful death, or loss of property resulting from government employee negligence or wrongful acts, except in certain specific circumstances. In 1966, the FTCA was amended to require submission of an administrative claim prior to suit. Congress' long-term goal was to establish a uniform remedy and fair compensation for tort victims, while freeing itself from the heavy burden of private relief legislation. The FTCA has successfully accomplished these objectives.³

II. BASIS OF LIABILITY

A. That of the Private Person Under Local Law

Congress intended that the FTCA result in liability against the United States on the same basis as permitted against a private person under the law of the state where the act or omission occurred. Thus there must be a substantive cause of action under state law to support a claim.⁴ The FTCA waiver of sovereign immunity must be strictly construed and be clearly found within the wording of the statute.⁵ The waiver is not absolute, because Congress made express limitations on the FTCA coverage.⁶

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1. 28 U.S.C. §§ 1346 (b), 2401, 2402, 2671, 2672, 2674 — 2680.

2. Several claim statutes were enacted previously, including the Small Tort Claims Act in 1922 and the Damage Due to Gun Fire and Military Maneuvers Act in 1912, which was a forerunner of the Military Claims Act, 10 U.S.C. § 2733.

3. For an excellent discussion of the historical basis of the FTCA, see L. JAYSON, *HANDLING FEDERAL TORT CLAIMS*, ch. 2 (rev. perm. ed. 1989).

4. 28 U.S.C. § 1346 (b); *Massachusetts Bonding v. United States*, 352 U.S. 128 (1956); *Richards v. United States*, 369 U.S. 1 (1962); *Henderson v. United States*, 846 F.2d 1233 (9th Cir. 1988); *Corrigan v. United States*, 815 F.2d 954 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 290 (1987); *Leigh v. NASA*, 860 F.2d 652 (5th Cir. 1988). The last two cases cited make it clear that the United States is entitled to any defense available under state law.

5. *United States v. King*, 395 U.S. 1 (1969); *Wood v. Standard Products Co.*, 671 F.2d 825 (4th Cir. 1982).

6. 28 U.S.C. § 2680.

For example, claims arising out of the exercise of discretionary functions are excluded,⁷ as are incidents occurring in a foreign country.⁸ Certain enumerated intentional torts are also excluded. However, assault, battery, false arrest, and false imprisonment, when committed by an investigative or law enforcement official, are cognizable.⁹ In addition, the U.S. Supreme Court, in *Feres v. United States*, made a judicial limitation to the FTCA by ruling that there is no liability for injuries to military personnel when such injuries arise incident to service.¹⁰

B. No Absolute Liability

Liability under the FTCA may not be based on a theory of strict liability (absence of fault) even where the activity involved is characterized as ultrahazardous under state law. There must be a showing of negligence on the part of a government employee.¹¹

C. Status of Tortfeasor and Scope of Employment

Who Is An Employee? In order for the United States to be liable under the FTCA in Air Force cases, there must have been a negligent or wrongful act or omission by an Air Force "employee" acting within the scope of employment.¹² federal law, rather than state law, determines whether an individual is an employee of the United States.¹³ The general criterion that determines whether an individual is such an employee is the Federal Government's right to control the day-to-day details of that person's work.¹⁴ The presence of a formal employment relationship is not crucial and unpaid volunteers can be employees capable of subjecting the Government to tort liability.¹⁵ The following groups have all been clearly recognized as federal employees: members of the Armed Forces;¹⁶ appropriated and nonappropriated fund civilian employees;¹⁷ National Guard members, when performing federal duties under either Title 10 or Title

7. *Id.* at § 2680 (a). *United States v. Varig Airlines*, 467 U.S. 797 (1984). To fit the exception there must be activity or decisions taken that involve policy matters. See *Berkovitz v. United States*, 486 U.S. 531 (1988).

8. 28 U.S.C. § 2680 (k); *Roberts v. United States*, 498 F.2d 520 (9th Cir. 1974). However, the injured party may have a claim remedy under the Military Claims Act, 10 U.S.C. § 2733; the Foreign Claims Act, 10 U.S.C. § 2734; or the International Agreement Claims Act, 10 U.S.C. §§ 2734(a), 2734 (b).

9. 28 U.S.C. § 2680(h). See generally *Sheridan v. United States*, 487 U.S._____, 108 S.Ct. 2449 (1988). The misrepresentation exception encompasses negligent as well as intentional misrepresentations. See *United States v. Neustadt*, 366 U.S. 696, 702 (1961). AAFES Security Guards are not federal law enforcement officers. See *Solomon v. United States*, 559 F.2d 309 (5th Cir. 1977).

10. 340 U.S. 135 (1950); *United States v. Jackson*, 481 U.S. 681 (1987). Likewise, the *Feres* doctrine bars suit against the federal employee alleged to be the direct tortfeasor so long as said employee was acting within the scope of employment. Nonincident to service claims, such as the military member's loss of consortium resulting from injury to a dependent, are not barred. See *Roback v. United States*, 658 F.2d 471 (7th Cir. 1981). A similar FTCA bar exists for civilian employees due to the exclusive remedy provision of the Federal Employees Compensation Act, 5 U.S.C. §§ 8101-51. See *Grijalva v. United States*, 781 F.2d 472 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 89 (1986).

11. *Laird v. Nelms*, 406 U.S. 797, 799 (1972). This was a sonic boom case. The Supreme Court held that there can be no FTCA remedy absent a showing of negligence or wrongful act. See also *Craine v. United States*, 722 F.2d 1523 (1984).

12. 28 U.S.C. §§ 1346, 2672; see generally L. JAYSON, § 203, *supra* note 3.

13. *United States v. Orleans*, 425 U.S. 807 (1976); *Logue v. United States*, 412 U.S. 521 (1973); *Brandes v. United States*, 783 F.2d 895 (9th Cir. 1986).

14. *Logue*, 412 U.S. 521 (1973); *Orleans*, 425 U.S. 807 (1976); *Wood*, 671 F.2d 825 (4th Cir. 1982).

15. 28 U.S.C. § 2671.

16. *Id.*

17. *United States v. Hainline*, 315 F.2d 153, 156 (10th Cir. 1963), *cert. denied*, 375 U.S. 895 (1963); *Hass v. United States*, 518 F.2d 1138 (4th Cir. 1975); *Young v. United States*, 498 F.2d 1211 (5th Cir. 1974).

32;¹⁸ Civil Air Patrol members, when engaged in missions authorized by the United States;¹⁹ Air Force Reserve personnel;²⁰ and Air Force Academy Cadets.²¹ Obviously, an independent contractor is not an employee of the Government. Such entities and their employees are specifically excluded by the FTCA.²²

Employee Immunity from Personal Liability. As of 18 November 1988, all federal employees are immunized from personal liability for common law torts. The Federal Employees Liability Reform and Tort Compensation Act of 1988²³ amended the FTCA to prohibit any civil action for damages against an individual employee for negligence or wrongful acts committed while acting within the scope of employment. The only caveat is that, because the FTCA does not cover cases arising overseas, federal employees serving outside the territory of the United States do not enjoy this protection.²⁴

Scope of Employment. Whether the federal employee was acting within the scope of employment is an issue of substantive law to be decided in accordance with the law of the state where the incident occurred.²⁵ The basis of government liability is generally determined by principles of *respondeat superior*.²⁶ The FTCA defines scope of employment for military personnel to mean "acting in line of duty."²⁷ However, case law makes it clear that the test for scope of employment for military personnel will be identical to the one applied to federal civilian employees so as to avoid inconsistent results.²⁸ Scope of employment issues are being hotly litigated at present with some federal courts drawing an expanded definition of scope of employment in order to permit a remedy for the injured party.²⁹

18. In 1981, Congress amended 28 U.S.C. § 2671 to confer federal employee status on National Guard members when engaged in federal training. Civilian technicians are also extended federal employee status by virtue of the National Guard Technicians Act, 32 U.S.C. § 709.

19. 10 U.S.C. § 9441(c) as amended by Pub. L. No. 96-342, 94 Stat. 1121 (1980); *Williamson v. Sartain*, 555 F.Supp. 487 (D. Mont. 1982).

20. Reservists are employees of the Federal Government for liability purposes when either performing inactive duty training or serving on active duty under Title 10. See 32 C.F.R. 102.3; Air Force Reg. (AFR) 112-1, para. 12-12b (5); *United States v. Carroll*, 369 F.2d 618 (8th Cir. 1966).

21. Academy Cadets are "members of the armed forces." See *Collins v. United States*, 642 F.2d 217 (7th Cir. 1981).

22. 28 U.S.C. § 2671; *Yates v. United States*, 365 F.2d 663, 668 (4th Cir. 1966); *United States v. Page*, 350 F.2d 28, 34 (10th Cir. 1965), cert. denied 382 U.S. 979 (1966). See also cases cited *supra* note 14. However, where the Government exercised a sufficient degree of control over the independent contractor, courts find liability under the FTCA. See *Gamble v. United States*, 648 F.Supp. 438 (N.D. Ohio 1986).

23. 28 U.S.C. § 2679(b) (1), Pub. L. No. 100-694. This amendment, commonly referred to as "Westfall Legislation," was Congress' response to the Supreme Court decision, *Westfall v. Erwin*, 484 U.S. 292 (1988) which raised doubt about employee immunity.

24. Other protections through administrative means are generally available. See AFR 112-1, para. 7-10(f).

25. *Washington v. United States*, 868 F.2d 332, 334 (9th Cir. 1989); *Williams v. United States*, 350 U.S. 857 (1955).

26. *Laird* 406 U.S. 797 (1972); *Williams*, 350 U.S. 857 (1955) *supra* note 25.

27. 28 U.S.C. § 2671.

28. *Bettis v. United States*, 635 F.2d 1144, 1147 (5th Cir. 1981); *Harris v. United States*, 718 F.2d 654, 657 (4th Cir. 1983). See L. JAYSON, *supra* note 3, at 204, for an excellent discussion of this point.

29. An excellent example is the result in *Washington*, 868 F.2d 332, 334 (9th Cir. 1989), where the court concluded that two off-duty military personnel, while in on-base government quarters, were within the scope of employment when they violated local military fire safety regulations. See also *Lutz v. United States*, 685 F.2d 1178 (9th Cir. 1982), where servicemember's negligent failure to control his dog in violation of a base housing regulation was within the scope of employment and the United States was liable for injuries to a bitten child. Cf. *Nelson v. United States*, 838 F.2d 1280 (D.C. Cir. 1988), holding opposite to *Lutz*.

III. PROCEDURAL ASPECTS OF THE FTCA

A. Basic Administrative Claim Prerequisites

Although the FTCA permits recovery of government liability on the same basis as a private person, Congress created a number of procedural "hoops" through which the claimant must jump to obtain a remedy. The first is the requirement to present to the appropriate federal agency an administrative claim in writing and for a sum certain.³⁰ The claim must provide sufficient notice to the agency to permit investigation.³¹ However, failure to provide all requested factual information is not in and of itself a basis to deny an administrative claim if sufficient information is available to permit adjudication.³² The claim must be signed and must reveal on its face or by document attachment that it has been presented by the proper party, either directly by the injured party or by a properly authorized representative.³³

If the claim is for wrongful death, it must be presented by a properly designated executor or administrator or other person legally entitled under applicable state law.³⁴ A spouse claiming loss of consortium must either join in the other spouse's claim or file a separate claim.³⁵ Where the claim alleges negligence involving more than one federal agency (for example, where a claimant asserts negligent medical care received at multiple federal medical facilities), the administrative claim should be presented by the claimant to each involved agency. However, an agency that receives such a claim is required to contact all other agencies that are involved. Eventually agreement will be reached as to which agency will take the lead on behalf of all either to settle or deny the claim.³⁶

An administrative claim may be amended at any time prior to final agency action. Such an amendment provides the agency a fresh six-month period in which to evaluate and act on the amended claim before the claimant will be permitted to initiate suit. Additionally, a claimant may seek reconsideration of a final denial and that request also permits a new six-month period for the agency to make a final disposition of the claim.³⁷

B. Statute of Limitations/Miscellaneous

Two Years to Present Claim. A further jurisdictional prerequisite to a lawsuit is compliance with the FTCA two-year statute of limitations.³⁸ This requires presentation

30. 28 U.S.C. § 2675(a), 28 C.F.R. § 14.2(a). *Avril v. United States*, 461 F.2d 1090 (9th Cir. 1972). The courts have recognized that the provisions of 28 U.S.C. § 2675(a) create a jurisdictional prerequisite to filing a lawsuit pursuant to the FTCA. *Montoya v. United States*, 841 F.2d 102 (5th Cir. 1988). The sum certain cannot be increased in a subsequent suit absent newly discovered evidence. See *infra* note 63.

31. *Warren v. U.S. Dep't of Interior Bureau of Land Management*, 724 F.2d 776 (9th Cir. 1984); *Free v. United States*, 885 F.2d 840 (11th Cir. 1989); *Adams v. United States*, 622 F.2d 197 (5th Cir. 1980); *Montoya*, 841 F.2d 102 (5th Cir. 1988). Generally, all that is required from the claimant is "notice of the manner and general circumstances" of the injury and harm suffered.

32. AFR 112-1, para. 12-11f. See *Avery v. United States*, 680 F.2d 608 (9th Cir. 1982); *GAF Corp. v. United States*, 818 F.2d 901 (D.C. Cir. 1987); *Charlton v. United States*, 743 F.2d 557 (7th Cir. 1984).

33. 28 C.F.R. § 14.3; AFR 112-1, Para. 12-9. See *Graves v. United States*, 692 F.2d 71 (9th Cir. 1982). Recent rulings, including *Free*, 885 F.2d 840 (11th Cir. 1989); indicate that courts will not find a jurisdictional defect where there was a failure to show authority to represent at the time the administrative claim was presented, so long as the defect is corrected at trial.

34. 28 C.F.R. § 14.3(c); AFR 112-1, para. 12-9c. However, see 885 F.2d 840 (11th Cir. 1989).

35. *Manko v. United States*, 830 F.2d 831, 838 (8th Cir. 1987).

36. 28 C.F.R. § 14.2(b) (2).

37. 28 C.F.R. § 14.2(c) is the authority for amendments. 28 C.F.R. § 14.9(b) covers reconsideration requests.

38. 28 U.S.C. § 2401(b).

to (receipt by) the appropriate federal agency within two years of the date the claim accrues.³⁹ A claim accrues under the FTCA when the claimant knew or should have known that there was an injury and its cause.⁴⁰ Accrual is not postponed until such time as the claimant actually becomes aware that the injury-causing act was negligent.⁴¹ The accrual date is based on an objective reasonable-person standard, that is, when a reasonable person would have possessed sufficient facts to discover the alleged negligence.⁴²

Compliance with the FTCA statute of limitations, because it is a specific condition to waiver of sovereign immunity, is a prerequisite to a claimant's success. Equitable considerations will not modify the requirement.⁴³ For example, the infancy of the injured party does not postpone accrual.⁴⁴ Nor does mental incapacitation or incompetence delay the running of the two-year period.⁴⁵ However, some courts have made an exception where the claimant's incompetence results from the Government conduct that gave rise to the claim.⁴⁶

Six Months to File Suit. The second part of the FTCA statute of limitations requires that a claimant who wishes to file suit do so in an appropriate U.S. federal district court no later than six months after the federal agency has taken final action to deny the claim.⁴⁷ However, if the agency has not acted on the claim within six months of the date of filing, the claimant has the option of filing suit regardless of any pending negotiations to settle the administrative claim.⁴⁸ These statute of limitations provisions do not apply during litigation to any claim asserted under the Federal Rules of Civil Procedure in the form of a third-party complaint, cross-claim or counterclaim.⁴⁹

Venue for FTCA suit lies only in the judicial district where the plaintiff resides or, alternatively, where the tort occurred.⁵⁰ If suit is filed, the case would be tried by the U.S. district court judge, without a jury. The FTCA expressly prohibits a jury trial.⁵¹

39. *Bailey v. United States*, 642 F.2d 344 (9th Cir. 1981); *Drazan v. United States*, 762 F.2d 56, 58 (7th Cir. 1985); *Zelevnik v. United States*, 770 F.2d 20, 22 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 1513 (1986). Compute the two-year period by applying FED. R. CIV. P. 6a, which excludes the day of the injury, but includes the last day of the two-year period, unless a Saturday, Sunday or holiday. *Maahs v. United States*, 840 F.2d 863 (11th Cir. 1988).

40. Accrual is determined by federal, not state, law. *United States v. Kubrick*, 444 U.S. 111 (1979). In wrongful death cases, the claim accrues no earlier than the date of death, even when the negligence that eventually caused the death occurred years before. *See Washington v. United States*, 769 F.2d 1436 (9th Cir. 1985).

41. *Kubrick*, 444 U.S. 111 (1979).

42. *Nemmers v. United States*, 795 F.2d 628, 632 (7th Cir. 1986); *Barren v. United States*, 839 F.2d 987 (3d Cir. 1988).

43. *See generally* L. JAYSON, *supra* note 3, at § 275.02.

44. *Fernandez v. United States*, 673 F.2d 269, 271 (9th Cir. 1982); *Jastremski v. United States*, 737 F.2d 666, 669 (7th Cir. 1984); *Leonhard v. United States*, 633 F.2d 599, 624 (2d Cir. 1980), *cert. denied*, 451 U.S. 908 (1981); *Robbins v. United States*, 624 F.2d 971, 972 (10th Cir. 1980).

45. *Casias v. United States*, 532 F.2d 1339, 1342 (10th Cir. 1976); *Crawford v. United States*, 796 F.2d 924 (7th Cir. 1986).

46. *Washington*, 769 F.2d 1436 (9th Cir. 1985); *Clifford v. United States*, 738 F.2d 977 (8th Cir. 1984). However, other courts have made no exception in such cases. *See Barren*, 839 F.2d 987 (3d Cir. 1988).

47. 28 U.S.C. § 2401(b); 28 C.F.R. § 14.9(a); *McDuffee v. United States*, 769 F.2d 492 (8th Cir. 1985). The court lacks subject matter jurisdiction if suit is filed before the agency has had at least six months to evaluate and act on the claim. *Gregory v. Mitchell*, 634 F.2d 199, 204 (5th Cir. 1981); *Caton v. United States*, 495 F.2d 635 (9th Cir. 1974).

48. 28 U.S.C. § 2675(a); *Free*, 885 F.2d 840 (11th Cir. 1989).

49. 28 U.S.C. § 2675(a); FED. R. CIV. P. 13.

50. 28 U.S.C. § 1402(b).

51. 28 U.S.C. § 2402; *Neustadt*, 366 U.S. 696, 702 (1961).

IV. DAMAGES IN FTCA CASES

A. Measure of Damages – No Punitive Damages Allowed

Damages due a claimant are measured by the law of the state where the negligence or wrongful act occurred.⁵² However, the FTCA expressly prohibits punitive damages,⁵³ as well as prejudgment interest.⁵⁴ Generally, claimants are entitled to compensatory damages for each element of loss or injury proximately caused by the negligent act, and which are recognized as compensable under state law. The objective is to correct the wrong and replace the loss, not to reward the injured party nor to punish the Government.⁵⁵ Regardless of how described, damages which exceed that which is necessary to provide compensation for losses actually sustained are punitive, and, therefore, prohibited by the FTCA.⁵⁶ Where available under state law, statutory limitations or "caps" on damages apply fully to the Federal Government.⁵⁷

B. Collateral Sources of Compensation

Where local law recognizes the collateral source rule, the claimant is entitled to a full FTCA settlement from the Federal Government even if the injured party receives private insurance proceeds or worker's compensation payments.⁵⁸ However, direct payments received from other federal sources that compensate for the loss or injury are normally deductible from an award or settlement.⁵⁹

C. Attorney Fees Limited

Fees for a claimant's legal representation during the administrative phase of an FTCA case are expressly limited to twenty percent of any settlement reached.⁶⁰ If litigation is initiated, the fee may be increased to twenty-five percent; this entices some attorneys to file suit, even where the federal agency has attempted to reach a reasonable administrative settlement.⁶¹ All fees are paid from the amount awarded, not in addition to that amount.⁶²

52. *Richards*, 369 U.S. 1 (1962). The Supreme Court ruled that the "whole law" of the state where the negligence occurred must be applied in an FTCA case, rather than the law of another state where the negligence had its operative effect.

53. 28 U.S.C. § 2674.

54. *Id.*

55. *Barnes v. United States*, 685 F.2d 66, 69 (3d Cir. 1982).

56. *Flannery v. United States*, 718 F.2d 108, 110 (4th Cir. 1983); *United States v. English*, 521 F.2d 63, 70 (9th Cir. 1975).

57. Since government liability is the same as that of a private person, these statutory limitations apply. *Smith v. Pena*, 621 F.2d 873, 881 (7th Cir. 1980); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985); *Taylor v. United States*, 821 F.2d 1428 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1300 (1988). The last two cases involve a statutory cap of \$250,000 in noneconomic damages in medical malpractice cases.

58. *Smith v. United States*, 587 F.2d 1013 (3d Cir. 1978); AFR 112-1, para. 12-12(d) (1).

59. For example, CHAMPUS and Veterans' benefits. See *Brooks v. United States*, 337 U.S. 49, 53-54 (1949); *Mays v. United States*, 806 F.2d 976 (10th Cir. 1986). *Kubrick v. United States*, 581 F.2d 1092, 1098 (3d Cir. 1978), *rev'd on other grounds*, 444 U.S. 111 (1979). However, if the claimant made a "contribution" to the fund from which the payments are received, such as with Medicaid or Social Security, there is no deduction from an FTCA award. *Siverson v. United States*, 710 F.2d 557, 560 (9th Cir. 1983); *Berg v. United States*, 806 F.2d 978, 985 (10th Cir. 1986).

60. 28 U.S.C. § 2678.

61. *Id.*

62. *United States v. Cohen*, 389 F.2d 689 (5th Cir. 1967); *Jaslow v. United States*, 308 F.Supp. 1164, 1165 (E.D.N.Y. 1970).

D. Damages Limited by Amount Claimed Administratively

Except where there is a showing of newly discovered evidence affecting the amount of damages, plaintiffs are precluded from recovering damages exceeding what they claimed administratively. However, if for example, new medical evidence obtained subsequent to the filing of the claim indicates that the claimant's injury is permanent rather than temporary, this would be a basis to seek additional damages at trial.⁶³

V. CONCLUSION

In 1946 (and as amended thereafter), Congress provided a needed and meaningful remedy to persons injured because of government negligence or wrongful acts. The remedial scheme allows an efficient means of resolving claims administratively while permitting judicial involvement and resolution when deemed appropriate by the injured party. Thus the interests of the federal taxpayer as well as the goal of just and fair compensation are equally served.

63. 28 U.S.C. § 2675(b). In the following cases no increase was permitted: *Jackson v. United States*, 730 F.2d 808, 810 (D.C. Cir. 1984); *O'Rourke v. Eastern Airlines*, 730 F.2d 842, 855 (2d Cir. 1984); *Low v. United States*, 795 F.2d 469 (5th Cir. 1986). However, in *Cole v. United States*, 861 F.2d 1261 (11th Cir. 1988), evidence was sufficient to permit an increase over the amount claimed administratively. A similar result was reached in *Fraysier v. United States*, 766 F.2d 478 (11th Cir. 1985).



Damages Limitations Under the Federal Tort Claims Act

MAJOR WALTER D. PHILLIPS, USAF

I. INTRODUCTION

The enactment of the Federal Tort Claims Act (FTCA)¹ understandably appeared to many persons, lawyers as well as laymen, to be opening the floodgates of government largesse. However, this perception was not consistent with Congressional intent, which was to allow for pecuniary compensation only under certain limited circumstances and subject to certain substantive and procedural restrictions. The FTCA, in fact, contains several significant limitations upon the waiver of sovereign immunity that it grants. For example, an injured party must present a claim within two years after the date on which the claim accrues² and must file suit within six months after an administrative claim is denied³ in order to satisfy the FTCA's jurisdictional requirements. Additionally, the FTCA specifically excludes liability for such activities as the exercise of government discretionary functions, the carriage and delivery of mail, negligent or intentional torts committed by government employees, and claims arising in a foreign country.⁴ The FTCA also contains significant limits upon the amount that a claimant or plaintiff may recover.

Since the FTCA's passage, a continuous inquiry has centered upon the nature and extent of these statutory limits. This article will examine these limits and their judicial interpretation, with particular emphasis upon the role of the base claims officer.

II. ADMINISTRATIVE CLAIM AMOUNT

One of the most significant limitations on governmental liability is the statutory prohibition against filing suit for more than the amount of the administrative claim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon *newly discovered evidence* not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of *intervening facts*, relating to the amount of the claim.⁵

Accordingly, there are only two bases upon which a plaintiff may sue for more than the amount of his administrative claim: "newly discovered evidence" and "intervening facts." Base claims officers should carefully examine an FTCA complaint to compare the demands in the suit and in the claim. When a plaintiff increases the amount sought, the Assistant United States Attorney should move to amend the *ad damnum* amount to that which was claimed administratively. Some decisions have indicated that courts may, on their own motion, apply this limit⁶ and

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1. 28 U.S.C. §§ 2671-80.

2. 28 U.S.C. § 2401(a).

3. *Id.*

4. 28 U.S.C. § 2680.

5. 28 U.S.C. § 2679(b) (emphasis added); Annotation, 80 A.L.R. Fed. 737 (1986).

6. *Corkle v. United States*, 94 F. Supp. 908 (E.D.S.C. 1951).

that a limit motion may be considered at any time during the trial;⁷ both aspects suggest that the statutory limit is jurisdictional,⁸ and not waived by failure to object when answering the complaint. Nonetheless, the motion to amend should always be made in the answer to the complaint.

Once the appropriate motion to amend the *ad damnum* amount is made, courts generally apply the limiting provision. In one court's opinion, the purpose of the statutory limit "would be meaningless if claimants, after rejection of their claim, could institute actions for amounts in excess of the claim filed merely because they, or their attorneys, are of the opinion that the claim has a greater value."⁹

How have the courts interpreted "newly discovered evidence" and "intervening facts?" The two terms have often been used interchangeably, leading to confusion. Generally, however, both terms relate to a material change in either the law or the claimant's medical condition, which was not "reasonably discoverable" at the time that the administrative claim was presented. Additionally, some courts have held that a claimant should not be required to know the full extent of his injuries when they are such that medical science cannot immediately establish them.¹⁰ A number of illustrative cases have arisen out of the Swine Flu vaccination program of the 1970s.¹¹ In the *Fraysier* decision, the Court of Appeals for the Eleventh Circuit allowed an amendment from \$50,000 to \$275,000. At the time plaintiff filed his claim, he had been diagnosed as suffering from a bacterial infection and informed that his prognosis for recovery was fair. Subsequently, he was diagnosed as suffering from Guillaume-Barre Syndrome (GBS) a "subtle and complex injury" with no hope of recovery. Due to the lack of medical knowledge of GBS (characterized by the court as a "mystery to the medical field"), the court held that plaintiff could not have reasonably discovered the full extent of his injuries at the time of filing his claim. The *Fraysier* court found that the amendment was legally based upon a "change in expectation," a concept used by courts in other circuits.¹²

On the other hand, a plaintiff was not allowed to increase her *ad damnum* amount when her physical change after the administrative claim was filed was merely "cumulative and confirmatory" of what she had already been told to expect.¹³ The recent *Reilly* decision held that merely because the direct consequences of malpractice, which were feared from the outset of a patient's injury, have become more certain does not make them "newly discovered evidence."¹⁴

In most personal injury cases, the controversy over increasing the *ad damnum* amount has three aspects: whether the plaintiff has developed new injuries that are consequences of the original tort; whether the plaintiff's condition has deteriorated or improved; or whether the plaintiff has become able to assess his condition, which has not changed.

As to the first aspect, the court must determine whether the plaintiff has developed injuries that are proximately related to the tort but which were not foreseeable at the time the claim was filed. In two cases dealing with patients who died after presenting

7. Schubach v. United States, 657 F. Supp. 348, 349, n.2 (D. Me. 1987).

8. See also Lopez v. United States, 758 F.2d 806 (1st Cir. 1985).

9. Nichols v. United States, 147 F. Supp. 6, 10 (E.D. Va. 1957), cited in Kielwein v. United States, 540 F.2d 676 (4th Cir. 1976).

10. Joyce v. United States, 329 F. Supp. 1242 (W.D. Pa. 1971), rev'd on other grounds, 474 F.2d 215 (3d Cir. 1973).

11. Fraysier v. United States, 766 F.2d 478 (11th Cir. 1985); McDonald v. United States, 555 F. Supp. 935 (M.D. Pa. 1983).

12. Fraysier, 766 F.2d. 478, 480 (11th Cir. 1985); United States v. Alexander, 238 F.2d 314, 318 (5th Cir. 1956).

13. Kielwein, 540 F.2d 676, 680 (4th Cir. 1967), cert. denied, 429 U.S. 979 (1976).

14. Reilly v. United States, 863 F.2d 149 (1st Cir. 1988).

their claims but before filing suit, the courts permitted their estates to increase the amounts sought, because their deaths were considered to be "intervening facts."¹⁵ However, if the complications were "reasonably discoverable" at the time of the claim¹⁶ or the connection between the tort and the complications were "too conjectural and speculative,"¹⁷ a plaintiff would not be allowed to increase the amount sought. In *Rudd v. United States*,¹⁸ the plaintiff was not allowed to sue for more than her claim although she had not completely recovered from her injuries in six to eight weeks, as her doctors had advised her the day after her injury. The court held that the full extent of her injuries was discoverable at the time she filed her claim, which was more than two months after her injury.

A second line of inquiry concerns whether the patient's condition deteriorated or improved after the claim was filed and, if so, whether the full nature of the injury was reasonably discoverable at the time of filing the claim.¹⁹ In a typical case, the complicated nature of the injury or disease may prevent the discovery of the full extent of the patient's need, even within the two-year statute of limitations.²⁰ In other cases, the patient's condition may unexpectedly improve, extending his life expectancy and thereby dramatically increasing the expense of caring for him. In such cases, courts have considered the improvement to be an "intervening fact" which warrants the increase in the *ad damnum* amount.²¹

Closely related to the idea of a change in a patient's condition is a change in either the physician's diagnosis or the ability of medical science to evaluate and/or treat the patient. In such instances, increases based upon either "intervening facts" or "newly discovered evidence" have been allowed. An unfortunately common example could arise where a brain-damaged child was originally thought to have some potential for improvement, but, as time went on, the potential for improvement dramatically decreased.²² In one case arising from an Air Force hospital, the plaintiff alleged that the Government had improperly withheld his mother's medical records, thereby impeding her ability to ascertain her true condition before it was too late to save her life. The court held that this allegation, if proven, could constitute "newly discovered evidence" and thereby allow an increase.²³ However, upon release of the requested records, the plaintiff must be able to demonstrate how the information contained therein would be "newly discovered evidence."²⁴

Finally, in that liability under the FTCA is premised upon state laws regarding damages, courts have routinely held that a change in those laws constitutes "intervening facts."²⁵

Occasionally, a plaintiff may attempt to justify an increase in the *ad damnum* amount on the basis of alleged "exceptional circumstances." This concept has no basis in the statute; nonetheless, a few sympathetic courts have used it in order to thwart what they see as the unduly strict construction of the statute.²⁶ However, almost all courts

15. *Nelson v. United States*, 541 F. Supp. 816 (M.D.N.C. 1982); *Beckcom v. United States*, 584 F. Supp. 1471 (N.D.N.Y. 1984).

16. *Rudd v. United States*, 233 F. Supp. 730 (M.D. Ala. 1964).

17. *Nichols v. United States*, 147 F. Supp. 6, 9 (E.D. Va. 1957).

18. *Rudd*, 233 F. Supp. 730 (M.D. Ala. 1964).

19. *Joyce*, 329 F. Supp. 1242 (W.D. Pa. 1971), *rev'd on other grounds*, 474 F.2d 215 (3d Cir. 1973).

20. See, e.g., *Campbell v. United States*, 534 F. Supp. 762 (D. Haw. 1982).

21. *Husovsky v. United States*, 590 F.2d 944 (D.C. Cir. 1978).

22. *Foskey v. United States*, 490 F. Supp. 1047 (D.R.I. 1980).

23. *College v. United States*, 411 F. Supp. 738 (D. Md. 1976), *aff'd*, 572 F.2d 453 (4th Cir. 1978).

24. *Barrett v. United States*, 622 F. Supp. 574 (S.D.N.Y. 1985).

25. *Funston v. United States*, 513 F. Supp. 1000 (M.D. Pa. 1981); *Gallimore v. United States*, 530 F. Supp. 136 (E.D. Pa. 1982).

26. *McCarter v. United States*, 373 F. Supp. 1152 (E.D. Tenn. 1973).

that have considered this concept have rejected it, finding it to be "unsupported by the statutes, regulations, and the legislative history" of the FTCA.²⁷

Probably the most effective way to establish the extent of the claimant's injuries, and the prognosis for either recovery or deterioration, at the time the claim is presented is the effective use of the "evidence and information" requirements in 28 C.F.R. § 14.4. Depending upon the nature of the claim (for death, personal injury, or property damage), the claimant may be required to submit extremely detailed information concerning the nature and extent of the injury or loss and future prospects. There continues to be controversy regarding how much evidence the Government can require under the provision, at least for determining whether a valid "claim" has been submitted.²⁸ One circuit has held that the jurisdictional limitations of the FTCA do not encompass those administrative regulations promulgated pursuant to a federal agency's claims settlement authority.²⁹ Nevertheless, effective and aggressive use of the regulation can establish the true nature of the claim in order to defeat an attempt to increase the *ad damnum* amount at trial.

III. FEDERAL STATUTORY DAMAGES LIMITS

The FTCA contains two specific statutory provisions that limit recovery by a claimant or plaintiff. Both are contained in 28 U.S.C. § 2674, which states that the United States "shall not be liable for interest prior to judgment or for punitive damages."

As to the first limitation, few cases have interpreted the nature and extent of "interest prior to judgment." Basically, it has been considered to be an absolute prohibition of any interest during the administrative claims process and any interest prior to a judgment being rendered during litigation. One significant case, *Southern Pacific Transp. Co. v. United States*,³⁰ held that the question is a matter of federal, not state, law. Thus, regardless of California State law, the court did not allow recovery of damages caused by the loss of use of the plaintiff's corporate capital, which had been used either to mitigate damages or to replace damaged property.

The prohibition against awarding recovery for punitive damages is also a matter of federal, and not state, law. Because only actual or compensatory damages are recoverable under the FTCA, the prohibition against punitive damages appears fairly simple. However, complications arise in at least two instances.

The first is very limited; in fact, it applies only to actions arising in Alabama, the sole state that retains a wrongful death statute allowing only punitive damages.³¹ However, in such a case the FTCA specifically provides that the United States "shall be liable for actual and compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought."³²

The second instance, much more frequent and complex, arises when a state damages statute, although not punitive by its terms, allows recovery of damages that might be considered punitive. Here the circuits are split. One group follows the Ninth Circuit, which explained in *Felder v. United States*³³ that punitive damages:

27. *McFarlane v. United States*, 684 F. Supp. 780, 783 (E.D.N.Y. 1988).

28. Compare, for example, *Avery v. United States*, 680 F.2d 608 (9th Cir. 1982) with *Emch v. United States*, 474 F. Supp. 99 (E.D. Wis. 1979), *aff'd*, 630 F.2d 523 (7th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981); generally, see Annotation, 73 A.L.R. Fed. 338 (1985).

29. *Warren v. United States Dep't of Interior Bur. of Land Man.*, 724 F.2d 776 (9th Cir. 1984).

30. 471 F. Supp. 1186 (E.D. Cal. 1979).

31. Ala. Code Sec. 6-5-410 (1975).

32. 28 U.S.C. § 2674.

33. 543 F.2d 657 (9th Cir. 1976).

may be thought of generally as damages intended to punish and deter. However, we are not bound to a narrow definition. Since the interpretation and application of the Act is a matter of federal law, we look to the purpose of the Act for a definition of punitive. Likewise, in deciding if a state statute is punitive, we look not to its language nor to the state court's characterization of it. Rather, we look to its effect.³⁴

Other circuits, however, have taken a very narrow view. According to the Sixth Circuit, Congress did not intend that the FTCA exclude "all customary damages awarded under traditional tort principles which mix theories of compensation and deterrence together."³⁵

Accordingly, when evaluating a claim or a complaint, claims officers should be alert to these elements that appear to be punitive rather than actual or compensatory. In distinguishing the two concepts, two cases may be of value. In considering the death of an adult, the court in *Montellier v. United States*³⁶ set forth the chief valuation elements: the age of the decedent; his health, habits, qualities, expectations of life and in life; learning ability, income and prospects of future income; the number, age, sex, situation, and condition of his dependents; and his disposition to support his dependents.³⁷ In a case concerning the death of a child, the Fifth Circuit in *Hoyt v. United States*³⁸ listed two elements of recovery: the loss of benefits to which the parent would have been entitled under state law and the loss of future "gifts" from the child.³⁹ Circuits also differ on whether to allow recovery for grief and loss of companionship. Some circuits specifically preclude that recovery, considering it a form of punitive damages,⁴⁰ while others allow it.⁴¹

IV. IMPACT OF STATE IMMUNITY OR DAMAGES STATUTES

The FTCA provides that the United States is liable "in the same manner and to the same extent as a private individual, under like circumstances."⁴² Two particularly significant areas for examination of this liability are state "recreational use" statutes and state "tort reform" enactments.

Numerous states have passed "recreational use" statutes that limit the liability of individuals or organizations if they are involved in certain types of recreation or if their property is used for recreational purposes. In the great majority of cases, courts have immunized the United States from liability under the same circumstances as a private defendant.⁴³ In the *Proud* case,⁴⁴ which arose from a diving accident at a national park in Hawaii, the Ninth Circuit found the United States within the immunity ambit of Hawaii's recreational use statute, even though federal lands were expressly excluded from those to which the statute applied. The key, according to the court, was that the United States is subject to the same liability as a private individual, and such individuals had no liability under the statute. However, some courts have held the United States liable in spite of a recreational use statute, finding that the United States had some further duty that it failed to perform or that

34. *Id.* at 669.

35. *Kalavity v. United States*, 584 F.2d 809, 811 (6th Cir. 1978).

36. 202 F. Supp. 384 (E.D.N.Y. 1962).

37. *Id.* at 422.

38. 286 F.2d 356 (5th Cir. 1961).

39. *Id.* at 359-60.

40. *D'Ambra v. United States*, 481 F.2d 14 (1st Cir. 1973), *cert. denied*, 414 U.S. 1075 (1973), *later proceedings*, 396 F. Supp. 1180 (D.R.I. 1973), *aff'd*, 518 F.2d 275 (1st Cir. 1975).

41. *Feler v. United States*, 543 F.2d 657 (9th Cir. 1976).

42. 28 U.S.C. § 2674.

43. Annotation, 47 A.L.R. 4th 262 (1986); Annotation, 66 A.L.R. Fed. 305 (1984).

44. *Proud v. United States*, 723 F.2d 705 (9th Cir. 1984), *cert. denied*, 467 U.S. 1252 (1984).

government employees or agents failed to meet the requisite standard of care to obtain immunity under the statute.⁴⁵ In *Ducey*, the Ninth Circuit considered a Nevada statute that protected landowners from liability unless permission to participate in a recreational activity was premised upon payment of some consideration. The court found that payment to concessionaires (who tendered a portion to the United States) in a national recreational area for rental of a boat slip and a trailer space and for goods constituted consideration within the terms of the statute, and that the United States could be liable for failing to properly protect users from a flash flood. However, the case was remanded to trial level for a determination of whether the United States was immune under the discretionary function exclusion⁴⁶ of the FTCA.

During the past two decades a large number of states have enacted, under the rubric of "tort reform," various statutory procedural requirements or dollar limitations upon plaintiffs' recoveries. Most, but not all, of those statutes pertain only to medical malpractice actions. When considering the applicability of these statutes to the FTCA, a number of questions arise. Do statutes limiting causes of action or monetary recoveries apply to actions against the United States under the FTCA? Do statutes limiting actions against state agencies, rather than private citizens or corporations, apply to the United States? What is the FTCA applicability of statutory requirements such as mandatory or voluntary arbitration or malpractice review panels?

Numerous decisions have held that any monetary limitations that would apply to private persons or corporations also apply to the United States.⁴⁷ Accordingly, regardless of whether a state statute places caps on economic losses or noneconomic losses, or both, the United States is entitled to its limitations. Two caveats, however, do apply: first, the statute must be valid under both the Constitution of the United States and the applicable state constitution. A number of such statutes, in particular those applying to medical malpractice actions, have been held unconstitutional.⁴⁸ Second, any statutes that limit punitive damages do not apply to FTCA actions, because the United States is not liable for punitive damages.⁴⁹

Moreover, the fact that a private individual, or even a corporation, does not engage in the particular activity that gave rise to the claim (e.g., operating an Air Force base)⁵⁰ does not matter, in that the United States is liable "under like circumstances."⁵¹ Basically, the United States is held to the standard for private individuals, if private individuals were engaged, or could be engaged, in the particular activity.

The meaning of "under like circumstances" is not clearly explained in the legislative history of the FTCA. Accordingly, the Supreme Court attempted to interpret the phrase in two landmark decisions, *Dalehite v. United States*,⁵² and *Indian Towing Co. v. United States*.⁵³ In each case, the decision turned upon whether the United States should be liable "as a private person" for an activity in which private persons were not ordinarily allowed to participate or whether the United States should be held to

45. *Ducey v. United States*, 713 F.2d 504 (9th Cir. 1983); *Martinez v. United States*, 780 F.2d 525 (5th Cir. 1986); *Coats v. United States*, 612 F. Supp. 592 (C.D. Ill. 1985).

46. 28 U.S.C. § 2680 (a); for a case considering the application of the discretionary function exception to a recreational use statute, see *Davidow v. United States*, 583 F. Supp. 1170 (W.D. Pa. 1984).

47. See, e.g., *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985).

48. Annotation, 80 A.L.R. 3d 583 (1977).

49. 28 U.S.C. § 2674. See, e.g., *Massachusetts Bonding Co. v. United States*, 352 U.S. 128 (1956).

50. *Air Transport Associates v. United States*, 221 F.2d 467 (9th Cir. 1955).

51. 28 U.S.C. § 2674.

52. *Dalehite v. United States*, 346 U.S. 15 (1953).

53. *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

the liability standard of a state or municipality that might participate in such activities. *Dalehite* arose from the explosion of a cargo of fertilizer that was being exported by the United States as part of a foreign aid program. Among other allegations of government negligence, plaintiffs alleged that the Coast Guard negligently fought the resulting fire. The Court held that the promulgation of the FTCA "did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights."⁵⁴ In that private persons had historically not been involved in fighting fires, at least not as an organized activity, the Court found that "like circumstances" did not exist, and the United States could not be liable. Two years later the Court ruled in *Indian Towing* that the Government's operation of a lighthouse in the Gulf of Mexico was an activity in which private individuals could, and in fact did, participate. Therefore, "like circumstances" existed and the United States would be liable.

Closely related to the issue of atypical activities for private individuals is whether the United States can take advantage of immunities extended to state agencies or municipalities. For example, certain states have legislated state immunity for medical malpractice committed in state hospitals.⁵⁵ Are those hospitals more analogous to federal hospitals than are private hospitals? Are state police more analogous to Air Force security police than are some private security guards "under like circumstances?" Possibly; the issue appears to be whether the Federal Government engages in an activity that is commonly performed by a municipality or a state. In such a case, the United States will be held to the proper performance of that duty.⁵⁶ However, many courts have held that this neither affords the United States any immunity which may be granted to states or municipalities⁵⁷ nor allows the United States to draw the local government distinction between "proprietary" and "governmental" activities.⁵⁸ In short, if the United States performs activities normally carried out by state or local governments, it will be liable for the performance of those activities just as if a private individual had been authorized to perform them. The United States will not obtain immunity given to states or municipalities, but will obtain relief (such as damages limits) that are available to private individuals.⁵⁹

Finally, a number of states have enacted other "tort reforms" such as creating medical malpractice mediation panels,⁶⁰ compelling arbitration,⁶¹ shortening statutes of limitations,⁶² providing for periodic payment over a specified number of years⁶³ and establishing patient compensation funds.⁶⁴ Although these mechanisms apply to private individuals, they do not apply to the United States because the FTCA establishes federal procedural law, which is independent of the FTCA's reliance upon state substantive law (such as standard of care, existence of a cause of action, and quantum of damages).

54. *Dalehite*, 346 U.S. at 43 (1953).

55. Annotation, 25 A.L.R. 2d 203 (1952); Annotation, 43 A.L.R. 4th 19 (1986).

56. *Louie v. United States*, 776 F.2d 819 (9th Cir. 1985).

57. *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957).

58. *Schindler v. United States*, 661 F.2d 552 (6th Cir. 1981).

59. *Ewell v. United States*, 776 F.2d 246 (10th Cir. 1985).

60. Annotation, 80 A.L.R. 3d 583 (1977).

61. Annotation, 55 A.L.R. 2d 432 (1957); Annotation, 84 A.L.R. 3d 375 (1978).

62. See, e.g., *Kenyon v. Hamner*, 588 P.2d 961 (Ariz. Civ. App. 1984).

63. Annotation, 41 A.L.R. 4th 275 (1985).

64. See, e.g., *Kranda v. Houser-Norburg Medical Corp.*, 419 N.E. 2d 1024 (Ind. App. 1981), *reh'g denied*, 424 N.E.2d 1064 (Ind. App. 1982).

V. DEDUCTIONS FROM AWARDS

Two types of deductions apply to awards made pursuant to the FTCA. First, deductions must generally be taken for benefits derived from the United States Government. Second, deductions may be taken for certain collateral or noncollateral benefits, according to the law of the state where the wrongful act occurred (i.e., the state whose law applies to FTCA damages evaluations).⁶⁵

Basically, if the federal benefit is fully paid from general Treasury funds of the United States, it is deductible from the recovery. However, if it is paid from special funds or is paid by the claimant, it is not deductible.⁶⁶

The most significant deductible items are veterans benefits, generally governed by the Veterans Benefit Act of 1962.⁶⁷ This statute requires, for example, that if future medical costs are allowed under an FTCA settlement or judgment, no veterans benefits shall be paid to the plaintiff until the aggregate amount of unpaid benefits equals the amount awarded in the settlement or judgment.⁶⁸ However, the Government is also entitled, at the time of settlement or judgment, to an exclusion of any amount based upon future benefits, even though their full extent may not be ascertainable at that time.⁶⁹ This would exclude, for example, future hospitalization or outpatient treatment at Veterans Administration or other hospitals. Some courts have held, however, that an injured party is "not obligated to seek medical care from the party whose negligence created his need for such care simply because that party offers it without charge."⁷⁰ Should the injured party elect not to be treated at a government hospital, future CHAMPUS payments should be estimated and excluded.⁷¹ In some cases the injured party may receive treatment under the Veterans Benefit Act before the case is settled or the judgment becomes final. In these cases, the award must be reduced by the cost of the treatment.⁷²

Two other significant deductibles are the payments to survivors through Dependency and Indemnity Compensation (DIC)⁷³ and the six-months wages death gratuity (currently limited to \$3000 maximum).⁷⁴ DIC is intended, in large part, to compensate survivors for the loss of the servicemember's financial support. Therefore, in each case involving DIC benefits, the court must determine which, if any, of those benefits duplicate elements of the possible FTCA award. If none of the FTCA damages are intended to compensate for that loss of financial support that is compensated by DIC, there will be no deduction.⁷⁵ However, in most FTCA claims, loss of the breadwinner's financial support is a major item. In such claims, DIC payments for loss of financial support should be deducted. As to the death gratuity, courts, beginning with *Brooks*, have uniformly held this amount to be deductible.⁷⁶

Many federal benefits, however, are either paid out of special funds or were funded, at least in part, by the deceased or the beneficiaries. In those cases, the past

65. Annotation, 12 A.L.R. 3d 1245 (1967); 77 A.L.R. Fed. 366 (1977).

66. *United States v. Harue Hayashi*, 282 F.2d 599 (9th Cir. 1960).

67. 38 U.S. Code, pt. II (1979).

68. 38 U.S. Code § 351.

69. *United States v. Brooks*, 176 F.2d 482 (4th Cir. 1949).

70. *Ulrich v. Veterans Administration Hospital*, 853 F.2d 1078, 1084 (2d Cir. 1988).

71. *Mays v. United States*, 806 F.2d 976 (10th Cir. 1986), cert. denied, 482 U.S. 913 (1987); *Burke v. United States*, 605 F.Supp. 981 (D. Md. 1985).

72. *Kubrick v. United States*, 581 F.2d 1092 (3d Cir. 1978), rev'd on other grounds, 444 U.S. 111 (1979); *Powers v. United States*, 589 F. Supp. 1084 (D. Conn. 1984).

73. 38 U.S.C. §§ 410-18.

74. 10 U.S.C. §§ 1475-90.

75. *Pike v. United States*, 652 F.2d 31 (9th Cir. 1981).

76. *Brooks*, 176 F.2d 482, at 485 (4th Cir. 1949).

and present benefits are not deducted from the FTCA award and any future payments of the benefit are not reduced by the award. For the survivors of military personnel, the proceeds of the Servicemans' Group Life Insurance (SGLI)⁷⁷ and earlier life insurance plans are not deductible, because the deceased member paid for the cost of the insurance, albeit at a subsidized rate.⁷⁸

A comparable result applies to payments under Social Security,⁷⁹ Medicare,⁸⁰ and Civil Service Retirement,⁸¹ because these are participatory programs, funded in part by the beneficiaries. Also, for federal civilian employees, the amounts received for using annual or sick leave are not deductible, in that to deduct them would reduce the plaintiff's accumulated benefit entitlement.⁸²

Beyond the matter of deductibility for federal employee benefits, questions often arise regarding the deduction of other types of benefits paid to the claimant. These questions must be answered by researching the law of the situs of the negligent or wrongful act or omission. Courts generally hold that, if a claimant receives benefits through an insurance plan to which he had not contributed, the United States will be entitled to a reduction in the FTCA award.⁸³

Another aspect of future benefits is that all future economic losses must be discounted to present value in order to avoid paying claimants or plaintiffs more than their economic losses and thus awarding punitive damages against the United States.⁸⁴

Finally, the United States will be able to reduce a future earnings award by the amount of federal income taxes that would have been payable.⁸⁵ However, this reduction usually results in an increase in the lump sum damages awarded by an amount equal to the income tax that would have to be paid on the earnings of the total award.⁸⁶ Some cases have even gone beyond the "collateral source" question and have held that failure to deduct future federal and state income taxes can be an award of punitive damages, because the claimant would be receiving more than the compensation authorized by the FTCA.⁸⁷

77. 38 U.S.C. §§ 765-79.

78. 176 F.2d 482, 485 (4th Cir. 1949).

79. 42 U.S.C. 401-33; *Smith v. United States*, 587 F.2d 1013 (3d Cir. 1978); *Harue Hayashi*, 282 F.2d 599 (9th Cir. 1960); *Coates*, 612 F. Supp. 592 (C.D. 111. 1985); cf. *Steckler v. United States*, 549 F.2d 1372 (10th Cir. 1977) (partial offset for funds contributed by government).

80. 42 U.S.C. 1395-96; *Siverson v. United States*, 710 F.2d 557 (9th Cir. 1983); *Manko v. United States*, 830 F.2d 831 (8th Cir. 1987); cf. *Overton v. United States*, 619 F.2d 1299 (8th Cir. 1980) (plaintiff had not contributed to Medicare but received benefits; payments held to be deductible from FTCA award).

81. 5 U.S.C. §§ 8331-51; *United States v. Price*, 288 F.2d 448 (4th Cir. 1961).

82. *Leeper v. United States*, 756 F.2d 300 (3d Cir. 1985).

83. *Scheib v. Florida Sanitarium & Benev. Assoc.*, 759 F.2d 859 (11th Cir. 1985); *McAdoo v. United States*, 607 F. Supp. 788 (E.D. Mich. 1984).

84. *O'Connor v. United States*, 269 F.2d 578 (2d Cir. 1959); *United States v. English*, 521 F.2d 63 (9th Cir. 1975); *Hollinger v. States*, 651 F.2d 636 (9th Cir. 1981); cf. *Barnes v. United States*, 685 F.2d 66 (3d Cir. 1982).

85. *DeLucca v. United States*, 670 F.2d 843 (9th Cir. 1982); *Shaw v. United States*, 741 F.2d 1202 (9th Cir. 1984); *Trevino v. United States*, 804 F.2d 1512 (9th Cir. 1986).

86. *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490 (1980), considered an award under the Federal Employers Liability Act, a statute that, like the FTCA, strictly limits recovery to compensatory damages.

87. *Felder*, 543 F.2d 657 (9th Cir. 1976); *Hollinger*, 651 F.2d 636 (9th Cir. 1981); *Harden v. United States*, 688 F.2d 1025 (5th Cir. 1982); cf. *Kalavity*, 584 F.2d 809 (6th Cir. 1978); *Manko v. United States*, 830 F.2d 831 (8th Cir. 1987); *Burke*, 605 F. Supp. 981 (D. Md. 1985); see generally Annotation, 47 A.L.R. Fed. 735 (1980).

VI. CONCLUSION

Congress, although willing to remedy a significant gap in federal tort law, was not willing to grant unrestricted access to federal coffers. Courts interpreting the FTCA have, in large part, appropriately carried out the congressional intent that deserving persons be adequately compensated for their pecuniary losses. Nevertheless, claims officers and assistant United States attorneys must become intimately familiar with the terms of the FTCA and the body of judicial law that has arisen around it. Only by close adherence to the rationale and language of the statute can government attorneys appropriately perform their dual task of adequately compensating claimants while safeguarding the rights of the United States.

Scope of Employment Under the Federal Tort Claims Act and Attempts to Expand the Limits

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I. INTRODUCTION

Imagine a military family, living in government-provided base housing, who have invited neighbors over for a weekend barbecue. At the barbecue, some of the preschool children begin "rough-housing" with the family collie. Two teenagers at the party are firing a BB gun at a target set up behind the house. The dog becomes agitated and bites one of the younger children on the face. Additionally, one of the teens fancies himself as "Billy the Kid" and accidentally shoots the other teen with a pellet. The parents of the child who was bitten and the parents of the teenager hit with the pellet file claims against the United States for the injuries suffered.

These accidents occurred, arguably, as a result of the failure of the housing occupant to restrain the dog and the teenager. In both of these cases, the claimants have alleged that the military member to whom the house was assigned was negligently acting in the course and scope of his employment with the Government at the time the accidents occurred. Unquestionably, the servicemember was holding a party at his private residence, on a nonduty day, and without any pretense of benefiting his employer. However, the United States has been held liable in similar scenarios under the Federal Tort Claims Act (FTCA),¹ based on the seemingly untenable rationale that the individual was acting in the course and scope of his employment at the time of the accident.

This article addresses the application of the doctrine of *respondeat superior* to the activities of government employees causing injury or damage to a third party. The purpose of this article is to provide a framework to analyze "scope of employment" issues and to identify and illustrate some of the apparent anomalies within the federal circuits in the application of the scope of employment requirement under the FTCA. After presenting a review of the statutory and historical concepts of scope of employment under the FTCA, the focus will be on the application of the doctrine to a variety of situations and recent attempts to extend liability to the activities of servicemembers that have occurred off duty and without apparent benefit to the Government.

II. PRIOR DEVELOPMENT

A. Statutory Framework

On August 2, 1946, Congress enacted a waiver of the Federal Government's sovereign immunity² to provide compensation to victims of "ordinary common law

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1. Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), 2671-80.

2. *Id.*

torts."³ In so doing, Congress granted general⁴ consent to sue for the "negligent or wrongful act" of a government employee. Jurisdiction for such actions is premised on 28 U.S.C. § 1346(b) that provides in pertinent part:

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

In drafting this limited waiver of sovereign immunity,⁵ Congress saw fit to define only three of the key terms: "federal agency," "employee of the government," and "acting within the scope of his office or employment." Unfortunately, the terms are defined in a less than precise fashion and provide only a starting point for analysis.⁶

Federal agency includes the executive departments, the judicial and legislative branches⁷, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.⁸

Employee of the government includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in the service of the United States, whether with or without compensation.⁹

Acting within the scope of his office or employment, in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.¹⁰

Based on the foregoing, analysis of a claim under the FTCA must begin with two basic questions: was the individual a "federal employee," and, if so, was he "acting within the scope or office of his employment" at the time in question?

B. Federal Employee Requirement

When determining whether an individual is a federal employee, the courts will look to federal law.¹¹ The question generally rests on the application of agency law –

3. *Dalehite v. United States*, 346 U.S. 15, 28 (1953).

4. Prior to enactment of the FTCA, a citizen could only obtain relief for a government tort if he fell within a handful of narrowly drawn statutes or could succeed in bringing a private relief bill before Congress. W. PROSSER & W. KEETON, *PROSSER AND KEETON ON THE LAW OF TORTS*, § 131, at 1033-34 (1984).

5. See 28 U.S.C. § 2674 that provides "[t]he United States shall be liable, respecting the provisions of this title, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." See *United States v. Orleans*, 425 U.S. 807 (1976).

6. See generally 2 L. JAYSON, *PERSONAL INJURY: HANDLING FEDERAL TORT CLAIMS*, §§ 200-04, 216 (1989).

7. The definition of "federal agency" was expanded to include "the judicial and legislative branches" with the passage of the *Westfall* legislation in 1988, Pub. L. No. 100-694, 102 Stat. 4563.

8. 28 U.S.C. § 2671.

9. *Id.*

10. *Id.*

11. See *Logue v. United States*, 412 U.S. 521, 528 (1973); *Brandes v. United States*, 783 F.2d 895, 896 (9th Cir. 1986); *Quilco v. Kaplan*, 749 F.2d 480, 483 (7th Cir. 1984); and *Cavazos v. United States*, 776 F.2d 1263, 1264 (5th Cir. 1985).

whether the Government has the power to control the detailed physical performance of the person's work.¹²

Section 2671 of the FTCA sets forth four categories of persons for whose conduct the United States is liable: officers or employees of any federal agency; members of the military or naval forces; members of the National Guard; and, persons acting on behalf of a federal agency. If the issue of "federal agency" is answered in the affirmative, the individual will generally be held to be a federal employee.¹³ Likewise, questions about the employment status of members of the military or naval forces will seldom arise. Questions concerning such individuals generally revolve around whether they were in the scope of their employment at the time alleged. However, questions of employment status may arise with military-related organizations, such as Reserve Officer Training Corps (ROTC).¹⁴ In addition, National Guardsmen are federal employees only when engaged in federal training or duty.¹⁵ When not performing federal service, the National Guards of the states are not federal agencies, because they are state-controlled.¹⁶ Finally, liability can arise from the actions of persons "acting on behalf of a federal agency." This can include persons appointed to serve without pay as official representatives of the United States or committees, commissions, advisory boards, etc.¹⁷

Although the FTCA appears to be explicit in defining those persons for whose conduct the United States is liable, much litigation has arisen concerning the specific exclusion of "any contractor with the United States" from the definition of the term "federal agency." Although legislative history provides little insight into the term "contractor,"¹⁸ the courts have generally held that the exclusionary language was intended to embrace, and ensure fidelity to, the common-law principle of *respondeat superior*. Specifically, the employer of an independent contractor is not liable in tort for the contractor's negligent acts or omissions.¹⁹ Likewise, the United States may not be held liable for the negligence of employees of its independent contractors.²⁰

The critical factor in distinguishing an agency from a contractor is the power of the Federal Government "to control the detailed physical performance of the contractor."²¹ The courts have consistently held that government contractors are *not* employees under the FTCA where the Government does not exert sufficient control over the day-to-day operations. For example, Department of Energy contractors implementing the nuclear research development and testing program are privately owned corporations that are not agents or employees of the Government.²²

12. See *Logue v. United States*, 412 U.S. 521, 528 (1973); *United States v. Orleans*, 425 U.S. 807, 814 (1976).

13. See generally 2 L. JAYSON, *supra* note 6, §§ 202-03, 216.

14. *Id.*

15. 28 U.S.C. § 2671.

16. *Maryland v. United States*, 381 U.S. 41 (1965). See also Annotation, *Federal Tort Claims Act: When is Government Officer or Employee "Acting Within the Scope of His Office or Employment" for Purpose of Determining Government Liability Under 28 U.S.C. 1346(b)*, 6 A.L.R. Fed. 373, 385 (1971).

17. See generally 2 L. JAYSON, *supra* note 6 § 203.04.

18. *Id.* at § 202.07.

19. See e.g., *United States v. Becker*, 378 F.2d 319, 321 (9th Cir. 1967); *Brucker v. United States*, 338 F.2d 427, 428 n.2 (9th Cir. 1964), *cert. denied*, 381 U.S. 937 (1965).

20. See, e.g., *Craghead v. United States*, 423 F.2d 664 (10th Cir. 1970); *Gowdy v. United States*, 412 F.2d 525, 534-35 (6th Cir. 1969), *cert. denied*, 396 U.S. 960 (1969).

21. *United States v. Orleans*, 425 U.S. 807, 814 (1976), applying RESTATEMENT (SECOND) OF AGENCY, § 2 (1958).

22. *United States v. New Mexico*, 455 U.S. 720 (1982).

C. Scope of Employment Requirement

Whether a particular act or omission happened in the scope of employment is a question of state law to be determined in accordance with the law of the place where the negligent act or omission occurred.²³ The courts have consistently determined liability by reference to the applicable state law doctrine of *respondeat superior*.²⁴ The only guidance provided by Congress as to what constitutes scope of employment is that, for military members, scope of employment "means acting in line of duty."²⁵ However, the courts have held that "line of duty" goes no further than to invoke state law of *respondeat superior*.²⁶ Further, an administrative determination that a military member was acting "in line of duty" is *not* dispositive of the question of scope, as such administrative determinations are routinely made concerning a servicemember's right to medical benefits.²⁷

D. Common Law Doctrine of *Respondeat Superior*

To understand the development of the law under the FTCA, one must first understand the basic common-law premise and history of the doctrine of *respondeat superior*. The scope of employment requirement has been said to be "the very heart and substance of the Act."²⁸ It has also been stated that this requirement clearly indicates that "Congress was undertaking with the greatest precision to measure and limit the liability of the Government under the doctrine of *respondeat superior*."²⁹

Respondeat superior, or "let the master answer," essentially means that the employer may be liable, in certain cases, for the wrongful acts of his employee, just as a principal can be liable for the acts of his agent.³⁰ The doctrine holds that employers are vicariously liable for the negligent or intentional acts committed by their employees while acting within the scope of their employment. Although there is no precise definition of "within the scope of employment," the *Restatement (Second) of Agency*, provides the following general description of scope of employment:

- (1) Conduct of a servant is within the scope of employment if, but only if:
 - (a) it is of the kind he is employed to perform;
 - (b) it occurs substantially within the authorized time and space limits;
 - (c) it is actuated, at least in part, by a purpose to serve the master, and
 - (d) if force is intentionally used by the servant against another, the use of the force is not unexpected by the master.

23. 28 U.S.C. § 2672; *Williams v. United States*, 350 U.S. 857 (1955). See also *Richards v. United States*, 369 U.S. 1 (1962) (Court stated that "[s]cope of employment" is one of numerous recurring issues committed to the substantive law of the state where the act or omission arose in accordance with 28 U.S.C. 2672.)

24. *Laird v. Nelms*, 406 U.S. 797, 803 (1972). See also Annotation, *supra* note 16, § 3.

25. 28 U.S.C. § 2671.

26. *Bissell v. McElligott*, 369 F.2d 115, 117 (8th Cir. 1966), cert. denied, 387 U.S. 917 (1967).

27. See, e.g., *Merritt v. United States*, 332 F.2d 397 (1st Cir. 1964); *Badger State Mutual Casualty Co. v. United States*, 383 F. Supp. 1226 (E.D. Wis. 1974); *Provost v. Smith*, 308 F. Supp. 1175 (D. Tenn. 1969); *Adams v. United States*, 302 F. Supp. 1147 (M.D. Pa. 1969).

28. *United States v. Campbell*, 172 F.2d 500, 503 (5th Cir. 1949), cert. denied, 337 U.S. 957 (1949).

29. *Id.*

30. BLACK'S LAW DICTIONARY 1179 (5th ed. 1979).

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.³¹

In applying these general rules to determine whether the employee's conduct fell within the scope of his employment, the courts in most states consider factors such as: whether the act is commonly done by the employee; the time, place, and purpose of the act; the previous relations between the employee and the employer; whether the employer has reason to expect that such an act will be done; the similarity in quality of the act done to the act authorized; whether the instrumentality by which the harm is done is furnished by the employer; the extent to which the employee departed from the normal method of accomplishing an authorized result; and whether the act is seriously criminal.³²

E. Cases Applying *Respondeat Superior* Under the FTCA

Scope of employment questions under the FTCA frequently arise from motor vehicle accidents involving government drivers using either a government vehicle or their private vehicle. The fact that the driver was an employee of the United States at the time of the accident is not, by itself, sufficient to impose liability under the FTCA. A distinction must be drawn between an accident happening (a) while an individual is employed by the Government, and (b) while the employee is acting within the scope of employment. The "employee" status is a necessary element, but the "scope" issue determines whether liability will be imposed on the Government. Essentially, liability under the FTCA is dependent upon the employee-driver being engaged in his employer's business when the accident occurs.³³

This article will next consider various issues arising out of the use of a Government owned motor vehicle.

Presumptions Arising from Ownership. Given that state law will generally govern the issue of scope of employment under the FTCA,³⁴ one may encounter the question of the applicability of a state law presumption based upon ownership of the vehicle. Many states impose a rebuttable presumption in actions for injuries caused by the negligent operation of the vehicle.³⁵ The presumption holds that proof of ownership of the vehicle establishes *prima facie* that the employee-driver was operating the vehicle in the scope of his employer's business at the time of the accident. In those states that apply the presumption to FTCA cases, it may be rebutted by persuasive evidence.³⁶

In *Erwin v. United States*,³⁷ a Volunteers In Service To America (VISTA) employee and her co-worker were provided twenty-four hour use of a government station wagon. At the time of the accident, the employees had left the three-county area to which they were assigned and were driving to Oklahoma City to catch a plane for a vacation at their homes on the East Coast. The district court found the VISTA worker to be in the scope of her employment at the time of the accident based on a dual purpose doctrine. The court based its ruling on the Oklahoma rule that evidence

31. RESTATEMENT (SECOND) OF AGENCY, § 228 (1958).

32. See generally RESTATEMENT (SECOND) OF AGENCY, § 229 (1958); W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS, §§ 69-70, at 499-508 (1984); L. JAYSON, *supra* note 6, § 216.

33. See generally L. JAYSON, *supra* note 6, §§ 216.02-216.03.

34. *Williams v. United States*, 350 U.S. 857 (1955).

35. See 8 AM. JUR. 2D *Automobiles and Highway Traffic* § 911 (1980).

36. See Annotation, *supra* note 16, § 4.

37. 302 F. Supp. 693 (W.D. Okla. 1969).

of a defendant's ownership of a car, coupled with proof that the driver was in his employment, raises a legal presumption that at the time of the accident, the driver was acting for the owner and within the scope of his employment, and the burden of proving the contrary is then shifted to the defendant.³⁸ The Tenth Circuit Court of Appeals reversed, holding that the personal nature of the employee-driver's trip overcame any presumption of scope of employment that may have arisen from the Government's ownership of the vehicle.³⁹

In *Keener v. Department of the Army*,⁴⁰ the court initially determined that the presence of the names "United States Government" and "Army" on the vehicle operated by an Army sergeant raised a rebuttable presumption under Pennsylvania law that the vehicle was owned by the Government and the driver of the vehicle was a servant acting in the scope of his employment at the time of the accident. However, evidence produced by the Government showed that the driver and his two companions were on their way to get something to eat at the time and their trip was purely personal, rebutting the inference raised by the ownership of the vehicle. Therefore, the court held the Government was not liable because the sergeant was not acting in the scope of his employment at the time.⁴¹

Permissive Use Statutes. A further issue may arise in states that have "permissive use" statutes that impose liability without fault on a vehicle owner. These statutes make liability an incident of ownership. The owner is held responsible for the negligence of a person who has his permission, either express or implied, to use the vehicle. The statutes provide this result regardless of whether the use is for the benefit of the owner.⁴² Because liability under the FTCA must be premised upon a finding of negligence by a government employee while acting in the scope of his employment, such state statutes have generally been held inapplicable to cases under the FTCA. Essentially, these statutes seek to impose strict liability without reference to the common law rules of *respondeat superior*. As the Supreme Court stated in *Dalehite v. United States*:

[T]he fact that the driver was using a vehicle which was owned by the Government will not suffice to impose liability. It is not the ownership of the property that is the basis of the Government's liability, but rather, in the explicit language of the Act, the negligent or wrongful conduct of the employee while acting within the scope of his employment.⁴³

Therefore, to the extent that such statutes extend liability beyond common law master-servant limits and impose liability on an owner without regard to the driver's scope of employment, they are not applicable under the FTCA.⁴⁴

Government Benefit and Control. Critical to the determination of whether the federal employee is within the scope of his employment is the degree to which the

38. *Id.* at 696.

39. 445 F.2d 1035, 1036 (10th Cir. 1971), *cert. denied*, 404 U.S. 992 (1971).

40. 498 F. Supp. 1309 (M.D. Pa. 1980), *aff'd*, 659 F.2d 1068 (3d Cir. 1981).

41. *Id.* at 1315. For similar cases that have applied rebuttable presumptions arising from proof of vehicle ownership in actions under the FTCA, see generally *Tomack v. United States*, 369 F.2d 350 (2d Cir. 1966); *O'Toole v. United States*, 284 F.2d 792 (2d Cir. 1960), *cert. denied*, 366 U.S. 927 (1961); *Rakowsky v. United States*, 201 F. Supp. 74 (N.D. Ill. 1961).

42. See 8 AM. JUR. 2D, *Automobiles and Highway Traffic* § 595 (1980).

43. 346 U.S. 15, 45 (1953).

44. See *Tomack*, 369 F.2d 350 (2d Cir. 1966); *O'Toole*, 284 F.2d 792 (2d Cir. 1960), *cert. denied*, 366 U.S. 927 (1961); *United States v. Hull*, 195 F.2d 64 (1st Cir. 1952); *Long v. United States*, 78 F. Supp. 35 (S.D. Cal. 1948). *Cf. with* *Essig v. United States*, 675 F. Supp. 84 (E.D. N.Y. 1987) (Court found government driver of government vehicle in scope of employment and imposed liability under *respondeat superior*. Alternatively, court ruled liability was based upon New York's permissive use statute.)

purposes of the United States are being served at the time of the incident and the amount of control exercised by the United States over that employee.⁴⁵ Findings of a lack of governmental benefit or control have been based upon a variety of factors. For example, in *Long v. United States*,⁴⁶ it appeared that a civilian driver employed by the War Department had detoured from the route he had been instructed to take while driving a staff car, so that he could make a Christmas Eve visit to his mother's house. The driver was instructed to deliver an Army officer to his home and return by the shortest and quickest route practicable. The court held that the driver was not in the scope of his employment when the accident occurred.⁴⁷ In *Mider v. United States*,⁴⁸ a motorpool sergeant issued himself a trip-ticket for one of the motorpool vehicles. While he and another soldier were on a drinking tour, they were involved in an accident. Suit against the United States was premised on the negligent acts of its employees. Overruling the district court, the circuit court held that although the sergeant had authority to dispatch the vehicle as part of his normal employment, he did not have the authority to dispatch the vehicle to himself for the purpose of touring bars. The court held he was not within the scope of his employment and no liability was imposed on the United States.⁴⁹

In *O'Toole v. United States*,⁵⁰ the court held that a government investigator was not acting in the scope of his employment when the government-owned automobile he was driving left the highway, ran up on the sidewalk, and struck a wooden telephone pole killing the investigator and injuring the plaintiff, a passenger in the car. Earlier in the day, the investigator had completed a raid, reported to his supervisor, and requested permission to use the government-owned automobile. His sole stated purpose for using the car was to take his baggage to his home, about a thirty-minute drive from the Government garage. Permission was granted with the provision that the car be returned immediately after dropping off the luggage. However, instead of going home, the investigator spent the remainder of the evening going from one bar to another, drinking and socializing, until he and his passenger left a bar and grill shortly before the accident occurred.⁵¹

While each of these cases found the government driver acted outside his employment, many courts have found that the government driver was acting in the scope of his employment at the time of the accident. This has been the result even where the employee may have deviated to some degree from his normal duties or where he was simultaneously benefiting both himself and the Government in operating the vehicle.

For example, in *Simpson v. United States*,⁵² a Marine recruiter was involved in a fatal accident after leaving a bar in Pennsylvania while driving a government vehicle. Passengers in the car included plaintiff's decedent and two others. After finding that the recruiter had been told to maintain contacts with young people as a source of potential recruits, the court held that the driver was in the scope of his employment at the time of the accident.⁵³

45. See, e.g., *James v. United States*, 467 F.2d 832 (4th Cir. 1972); *Williams v. United States*, 215 F.2d 800 (9th Cir. 1954).

46. 78 F. Supp. 35 (S.D. Cal. 1948).

47. *Id.* (Court refused to apply California permissive use statute that would impose liability without regard to fault.)

48. 322 F.2d 193 (6th Cir. 1963).

49. *Id.* at 197-98.

50. *O'Toole v. United States*, 284 F.2d 792 (2d Cir. 1960), cert. denied, 366 U.S. 927 (1961).

51. *Id.* Cf. *Essig v. United States*, 675 F. Supp. 84 (E.D. N.Y. 1987).

52. 484 F. Supp. 387 (W.D. Pa. 1980).

53. *Id.* at 393. (Court relied on RESTATEMENT (SECOND) OF AGENCY, § 228 (1958)).

The court stated that the evidence presented by the Government failed to rebut the presumption, under Pennsylvania law, that the driver of the government vehicle was in the scope of his employment at the time of the accident. In particular, the court stated that Marine recruiters frequented bars, with the knowledge of their superiors, for recruiting purposes and that each of the passengers was beneficial, in some way, to the recruiter's duties. Thus, the court concluded that the employee-driver "was in the scope of his employment at least in part, performing duties furthering the interest of the government in recruiting marines."⁵⁴ In *Obst v. United States Postal Service*,⁵⁵ the postal employee-driver was transporting an unauthorized passenger (injured plaintiff) to an unauthorized lunch location at the time of the accident. The court found the driver was in the scope of his employment and imposed liability on the Government by use of the dual purpose doctrine. Even though the driver was not allowed to have passengers and had traveled past his authorized lunch location (a practice known to his superior), he continued to be responsible for safeguarding the mail. Further, he could carry out this assigned responsibility by locking the vehicle or remaining with it. The court found that he had combined his purpose with his official task and remained in the scope of his employment.⁵⁶

This article now examines problems encountered involving private owned vehicles.

Factors to be Considered. While ownership of the vehicle is an important element in determining the scope of employment of the federal-driver, it is not necessarily controlling.⁵⁷ Numerous courts have examined the issue of whether the federal-driver was acting within the scope of his employment while operating a privately-owned vehicle. Among the factors to be considered are: was the use of the private vehicle authorized; was the employee engaged in government business at the time of the accident; if the employee was authorized to use his own car on government business, did the Government exercise or have the right to exercise control over the employee;⁵⁸ did the employee deviate sufficiently from his assigned duties to take him out of the scope of his employment; and was the employee's trip undertaken for the primary benefit of the Government, or was the trip at least as beneficial to the Government as it was to the employee.⁵⁹

Ordinarily, the Government does not authorize its employees to use private automobiles on government business. This policy permits the Government to control the use, maintenance, and dispatch of automobiles.⁶⁰ Regardless, liability may be imposed on the Government based upon the negligence of an employee acting in the course of his employment, while driving his own private automobile. Thus, if the employee's vehicle is defective, the Government will still be liable if the use of the private vehicle was authorized. The cases under the FTCA that arise from the use of privately-owned vehicles fall into a variety of categories which turn on their particular facts and the application of local law.⁶¹

Employee Found Not Acting Within Scope of Employment. A number of courts have determined that a federal employee was acting outside the scope of his employment while driving a private automobile. Generally, the cases turn either on the basis that the employee had deviated sufficiently from his assigned duties, or

54. *Id.* at 394.

55. 427 F. Supp. 696 (N.D. Cal. 1977).

56. *Id.*

57. See generally L. JAYSON, *supra* note 16, § 216.03; Annotation, *supra* note 16, § 6.

58. See RESTATEMENT (SECOND) OF AGENCY, § 239 (1958).

59. See generally L. JAYSON, *supra* note 5, § 216.03; Annotation, *supra* note 16, § 6.

60. See e.g., *Mider v. United States*, 322 F.2d 193 (6th Cir. 1963).

61. 28 U.S.C. § 1346(b).

because the trip taken by the employee was for the primary benefit of the employee, or it was more beneficial to the employee than to the Government.

For example, in *Dettmering v. United States*,⁶² an Army civilian employee was traveling in her private automobile from her duty station in Georgia to her leave address in North Carolina. From there, she was to proceed to Washington, D.C. for a three-day briefing, pursuant to official orders, in preparation for an upcoming tour in Vietnam. After leaving Fort Benning, she was involved in an accident in North Carolina. The court held that she was not, at the time of the accident, in the scope of her employment with the Army. The court pointed out that she was en route to visit relatives while on leave; she was going to dispose of her car prior to going overseas; she was not under travel orders nor was she receiving compensation for driving her car; and the Government had no control over her actions. The court concluded that her trip "was for personal reasons and that her negligent conduct, if any, should not be imputed to the United States."⁶³

In *Mrochinski v. Tendall*,⁶⁴ an Air Force civilian employee was on temporary duty from his station in California to Ohio to attend a production-management course. As part of his training courses in Ohio, the employee was also to attend classes "on location" at a plant in Wisconsin. The employee had been authorized use of his private automobile for the trip from California to Ohio. The accident occurred while the employee was driving from his motel in Milwaukee directly to the plant. In holding that the employee was outside the scope of his employment at the time of the accident, the court pointed out that the employee did not need his personal vehicle to attend the course in Wisconsin, and that he had it there for his personal convenience.⁶⁵ The court also stated that reimbursement had been authorized for the employee's use of his private vehicle only to the extent that these expenses did not exceed the normal government cost of public transportation; the travel authorization had not been marked to indicate that travel by private vehicle was more advantageous to the Government; the employee had been given ten days of leave in conjunction with the temporary duty; and the employee was not reimbursed for the mileage driven to Wisconsin.⁶⁶ Finally, the court quoted and relied up Comment (c) to Section 229 of the *Restatement (Second) of Agency*:

Acts of a personal nature. Although the servant is authorized to act, the master is not liable for his conduct unless the servant is in fact acting in the employment and for his master's purposes. . . . If, however, such acts are for the personal convenience of the employee and are merely permitted by the master in order to make the employment more desirable, the acts are not within the scope of employment . . .⁶⁷

In *James v. United States*,⁶⁸ a servicemember returning from annual field training exercises using his own automobile was found to be outside the scope of his employment. The court relied on the fact that the member had selected his own mode of transportation and the Government had no actual control over its operation or

62. 308 F. Supp. 1185 (N.D. Ga. 1969).

63. *Id.* at 1188. *Cf. with* *Hinson v. United States*, 257 F.2d 178 (5th Cir. 1958) (Court in *Dettmering* distinguished *Hinson* based on the fact that the federal driver in *Dettmering* was a civilian who was not subject to the UCMJ.)

64. 273 F. Supp. 221 (E.D. Wis. 1967).

65. *Id.* at 223. *Cf. with* *Purcell v. United States*, 130 F. Supp. 882 (N.D. Cal. 1955) (Air Force officer driving personal vehicle from his base to another city to attend a meeting as he had done on prior occasions. Court found officer was in scope of employment when he was involved in accident en route).

66. *Id.* at 223.

67. *Id.*

68. 467 F.2d 832 (4th Cir. 1972).

where it was to be used. This decision was followed in *Gupton v. United States*.⁶⁹ In that case, a Marine sergeant was returning from extended temporary duty in Okinawa to his permanent duty station at Camp Lejeune, North Carolina, to pick up his family for a subsequent permanent transfer to Albany, Georgia. He was given thirty-five days, of which thirty were charged as annual leave, before he was to report for duty at Albany. The sergeant had chosen to participate in the Marine Corps "Self-Move Program" to move his family. The program was instituted to provide an alternative to commercial movers, save the Government money, and provide the participating servicemembers "incentive pay."⁷⁰ Plaintiffs attempted to equate the Self-Move Program to the North Carolina Workman's Compensation Act, the latter of which would hold an employer liable "if the employee was acting for the benefit of the employer to any appreciable extent when the accident occurred."⁷¹ However, the court found this reliance inappropriate because the North Carolina Workman's Compensation Act lacked "[t]he element of control, which is central to *respondeat superior*"⁷² Similarly, the court found that the Self-Move Program did not provide the Government with the necessary degree of control over the sergeant's activities and refused to impose liability on the United States.⁷³

A similar set of facts was presented in *Garrett Freightlines, Inc. v. United States*.⁷⁴ There, an Army sergeant en route from Alabama to California was involved in an accident in Idaho. At the time of the accident, the sergeant was driving to Oregon as part of his forty-five days authorized leave or "delay en route." The court concluded that the member was traveling "merely during employment" and was not within the scope of employment. The court held that, absent the right to control the soldier's activities during travel, the member was not in the scope of employment under Idaho law.⁷⁵

Arizona law was applied in *Hartzell v. United States*⁷⁶ to find an Air Force sergeant outside the scope of her employment when she was involved in an accident in northern Arizona. The sergeant was permanently assigned to Kirtland Air Force Base, New Mexico, and was returning from temporary duty at Camp Mercury in Nevada when the accident occurred. While recognizing the "unique characteristics of military service"⁷⁷ and the possible "dual purpose"⁷⁸ of the member's trip, the court applied Arizona law to find the accident did not occur in the scope of the member's employment.⁷⁹ The court held that while the member's travel back to her permanent duty station was "in some part intended to serve the Air Force, this factor alone is not sufficient to bring her within the scope of employment."⁸⁰ The court relied, in part, on the fact that the sergeant had sought permission to use her private automobile for purely personal reasons; she was not performing any service-related duties while en route; and, she was on leave on the day of the accident. The last

69. 799 F.2d 941 (4th Cir. 1986).

70. *Id.* at 942.

71. *Id.* at 943.

72. *Id.*

73. *Id.* at 944.

74. 529 F.2d 26 (9th Cir. 1976).

75. *Id.* at 29. (Court relied on earlier holding in *Chapin v. United States*, 258 F.2d 465 (9th Cir. 1958), *cert. denied*, 359 U.S. 924 (1959).

76. 786 F.2d 964 (9th Cir. 1986).

77. *Id.* at 968 and 970. (Court referred to prior decision in *Lutz v. United States*, 685 F.2d 1178 (9th Cir. 1982) for "special factors characteristic of military activity . . .").

78. *Id.* at 970. (Court relied on reluctance of Arizona courts to extend "dual purpose" doctrine to *respondeat superior* cases).

79. *Id.* at 970.

80. *Id.* at 967.

factor reaffirmed the Ninth Circuit's earlier recognition of the "Air Force's distinction between leave and approved travel time [which] may decide a case."⁸¹

In *Stone v. United States*,⁸² a naval enlisted man was given orders directing commercial travel. Contrary to those orders, the member was driving his personal car at the time of the accident. The court held, under Florida law, that the accident occurred outside the scope of the member's employment with the Navy.⁸³ Similarly, in *Frazier v. United States*,⁸⁴ the court refused to impose liability on the United States for an accident involving a civilian employee of the United States Forest Service. At the time of the accident, the employee was driving his private automobile while attempting to find a home for his family after having accepted a transfer from another city. Regulations provided that, during the trip, the employee was to be considered in a "duty status" and was to receive his full salary. He was also to be reimbursed expenses, and both he and his wife were to receive a *per diem* allowance. The court found that these facts did not support plaintiff's contention that the trip was "in the furtherance of the [government's] business," and held that the federal driver was not in the scope of his employment under Tennessee law.⁸⁵

Finally, in *Harris v. United States*,⁸⁶ two teenagers were injured when their car ran off the road near Fort Jackson, South Carolina. According to the plaintiffs, a military officer came upon the scene and rendered assistance. Thereafter, the officer flagged down a passing automobile. This car was driven by an Army specialist fourth class, Ronnie Norris, who had earlier completed his assigned duties and returned to his temporary living quarters at a nearby motel. Norris was traveling with his girlfriend back to the base to attend a party, and both were dressed in civilian clothes when his car was flagged down. According to the girlfriend, Norris was directed to transport the teenagers to a local hospital. They were placed in the back of Norris' car and he drove off at a high rate of speed. As he drove onto Fort Jackson, Norris lost control of his vehicle and skidded off the road in to a tree. Norris and the two teenagers were killed, and the girlfriend was severely injured. Plaintiff contended that both the officer and the specialist were in the scope of their employment with the Government by virtue of their military status. The court held that neither was in the scope of employment, because they were not "'about [their] master's business' when the accident occurred."⁸⁷ In reaching this conclusion, the court held the officer, "was under no military duty (or common law duty) to render aid to the injured boys."⁸⁸ Additionally, the court found the order to Norris to transport the boys was not lawful, and refusal to obey could not have been punished under the Uniform Code of Military Justice (UCMJ).⁸⁹

Employee Found to be Acting within the Scope of Employment. In contrast to the preceding examples, numerous cases have imposed liability on the United States in similar settings. In *Robbins v. United States*,⁹⁰ the court applied Missouri law to find an Air Force major in the scope of his employment at the time of an accident. The major was on temporary duty from Nebraska to Scott Air Force Base, Illinois.

81. *Id.* at 967 citing *Berrettoni v. United States*, 436 F.2d 1372 (9th Cir. 1970).

82. 408 F.2d 995 (5th Cir. 1969).

83. *Id.* at 996.

84. 412 F.2d 22 (6th Cir. 1969).

85. *Id.* at 23.

86. 718 F.2d 654 (4th Cir. 1983).

87. *Id.* at 657 (Court cited *Lane v. Modern Music, Inc.*, 244 S.C. 299, 136 S.E.2d 713 (1964) for South Carolina law on *respondeat superior* and scope of employment).

88. *Id.* at 658.

89. *Id.*

90. 722 F.2d 387 (8th Cir. 1983).

After completing his duty, he was returning by the most direct route to Nebraska. His orders required him to report to Offutt Air Force Base, Nebraska, one day after completing his training at Scott Air Force Base – a distance of over 450 miles. The court held that:

the government did reserve the right to control Major Loper's physical acts or movements in driving his car; [and] by allowing him only one day in which to travel . . . , it impliedly instructed him to take the most direct route. Moreover, the fact that Major Loper received a per diem allowance for the day of the accident indicates that the government believed he was on government business during that day of travel.⁹¹

In *Berrettoni v. United States*,⁹² an airman was transferred from an Air Force base in Mississippi to one in South Dakota. The airman was granted thirty-six days delay in reporting, of which thirty days were charged as leave. After departing Mississippi, the airman drove to his leave address in Oregon prior to traveling to South Dakota. The accident occurred while the airman was driving through Montana in route to his new base. The court found that the airman was in a travel status reporting to his base and not in a leave status.⁹³ The Government attempted to argue that the granting of the thirty days leave and the fact that the airman was not on a direct route between his old and new bases should preclude the imposition of liability on the Government. The court held that, rather than abandoning his employment by driving to Oregon, the airman "was in the process of carrying out that employment by proceeding to [the new base] to report, and his deviation from the direct route was with the knowledge and consent of the Air Force."⁹⁴ Therefore, the court found the airman was in the scope of his employment under Montana law at the time of the accident.⁹⁵

In *United States v. Romitti*,⁹⁶ an Air Force civilian employee was sent with two other employees to a base 240 miles from their office to test certain equipment. The driver was authorized use of his private automobile with reimbursement on a *per diem* plus mileage basis. The driver was also given the choice of using either government or commercial transportation at his option. The accident occurred on the return trip. The court found the driver to be in the scope of his employment, stating,

We assume that in exercising the election which the United States gave these employees to use a private vehicle in performing the employer's errand, the employees were motivated at least in part by consideration of personal comfort and convenience. Nevertheless, the choice also served the interest of the United States and this is enough.⁹⁷

Subsequently in *United States v. McRoberts*,⁹⁸ the Ninth Circuit stated that *Romitti* turned on its own particular facts, including the fact that the employee was traveling on a special errand for his employer; that driving his own automobile was authorized; that he was paid travel expenses based on mileage; and, that he was not on leave or vacation.⁹⁹

91. *Id.* at 389. (Court distinguished instant case from *Bissell v. McElligott*, 369 F.2d 115 (8th Cir. 1966), *cert. denied*, 387 U.S. 917 (1967)).

92. 436 F.2d 1372 (9th Cir. 1970).

93. *Id.* at 1374.

94. *Id.*

95. *Id.*

96. 363 F.2d 662 (9th Cir. 1966).

97. *Id.* at 666.

98. 409 F.2d 195 (9th Cir. 1969), *cert. denied*, 396 U.S. 1014 (1970).

99. *Id.* (Court refused to follow *Romitti*, relying instead on ruling in *Chapin v. United States*, 258 F.2d 465 (9th Cir. 1958), *cert. denied*, 359 U.S. 924 (1959)).

Employees Subject to Military Discipline. In *Blesy v. United States*,¹⁰⁰ New York law was applied to find a serviceman in the scope of his employment while traveling from his parents' home to his new assignment while driving his father's automobile. In this case, Eugene Flynn, an Army servicemember, had requested and received a "compassionate reassignment" from his base at Fort Gordon, Georgia, to the Niagara Falls Support Detachment in New York. Flynn had requested the transfer to be near his mother who was suffering from a terminal illness. His orders provided a departure date of 3 December 1969 and a reporting date of 13 December 1969. He was authorized three days travel and seven days delay en route. Finally, the time and mode of travel was left to Flynn's discretion and the use of a private automobile was authorized. On 3 December, Flynn flew to Pennsylvania and was driven by his family to their home in Kersey, Pennsylvania. He remained there until 12 December when he departed in his father's car for Niagara Falls. The accident occurred that morning in Hamburg, New York.

Initially, the court stated that the Army's determination that Flynn was acting "within the line of duty" at the time of the accident was not dispositive of the scope issue.¹⁰¹ Next, the court turned to New York law of *respondeat superior* that sets forth two conditions for the imposition of liability: "First, the employer must be exercising or have the power to exercise some control, directly or indirectly, over the employee's activities. Second, the employee at the time of the accident must be acting in furtherance of the duties owed to the employer."¹⁰² The Government argued that "its indifference to and lack of control over the means of transportation used by Flynn should be decisive . . ."¹⁰³ The court found that the Army "had the right to control" Flynn's actions based upon the unique military relationship that held Flynn accountable for his actions under the UCMJ. As such, the court found the first prong of the test had been met.¹⁰⁴

As to the second element, the court stated:

New York adheres to the dual purpose doctrine The employer will be vicariously liable if some purpose or business of the employer was being furthered, even if the employee was simultaneously pursuing his own interest. The decisive question is . . . whether the trip would have been taken if the business purpose had been cancelled.¹⁰⁵

The Government argued that the "compassionate reassignment" was not made for any benefit of the Government and, at the time of the accident, Flynn had abandoned his employment to visit his family and had not yet returned to the employment relationship. Applying the above test, the court found that Flynn would not have been driving towards Niagara had his military orders been canceled and, therefore, held that he was acting within the scope of his employment at the time of the accident.¹⁰⁶

Prior to 1969, a number of courts had concluded that the military employee is subject to military discipline pursuant to the UCMJ for reckless or drunken operation of a vehicle¹⁰⁷ and were, therefore, subject to the control of the employer.¹⁰⁸

100. 443 F. Supp. 358 (W.D.N.Y. 1978).

101. *Id.* at 361.

102. *Id.* at 361, citing *Lundberg v. State*, 25 N.Y.2d 467, 306 N.Y.S.2d 947, 255 N.E.2d 177 (1969).

103. *Id.*

104. *Id.* at 362.

105. *Id.*

106. *Id.* at 363. (Court relied on *Cooner v. United States*, 276 F.2d 220 (4th Cir. 1960) that provides an excellent review of the questions presented by these cases.)

107. Article 111, UCMJ (10 U.S.C. § 911).

108. See *United States v. Myers*, 331 F.2d 591 (8th Cir. 1964); *Blesy v. United States*, 363 F.2d 662

With the 1969 Supreme Court decision in *O'Callahan v. Parker*,¹⁰⁹ subject matter court-martial jurisdiction was dependent upon a finding of "service connection." Thus, the operation of a nongovernment owned vehicle off base and between assignments was not service connected.¹¹⁰

While some courts hold that control is essential to *respondeat superior* liability and find it present in cases involving military personnel driving private cars in the course of their military service,¹¹¹ other courts hold that the element of control may or may not be significant in determining *respondeat superior* liability.¹¹² These issues will continue to be difficult to resolve, given the 1987 Supreme Court decision in *Solorio v. United States*.¹¹³ With this decision, the Supreme Court overruled *O'Callahan* and substituted a "status" test for the old "service connection" requirement.¹¹⁴ Subject matter jurisdiction now depends solely on whether the accused is a military member. Thus, the cases which rely on the military relationship to find the control element present would, seemingly, again have vitality. The issue of control, or the right to control, is often the deciding factor in these cases.

However, in most instances, the ability to control a military member's conduct while operating a privately owned vehicle en route to or from a new or temporary duty assignment is nothing more than a legal fiction. The fact that the employee is authorized to use his private automobile does not mean the Government has assumed control over its use.¹¹⁵ Generally, military personnel who are assigned to an initial or new permanent duty assignment travel pursuant to written military orders. The orders will normally specify the authorized date of departure, the new assignment, the required reporting date, the number of authorized "travel" days, the authorized modes of transportation, the amount of any authorized leave, and any other special instructions or relevant information. The choice of the particular means of travel is usually left to the individual, and the servicemember is either reimbursed based upon a mileage allowance or on the basis of the ordinary cost of a ticket by common carrier. Thus, the question becomes the extent to which the United States controls or directs the operation of the military member's vehicles.

Dual Purpose Doctrine. A final point to be emphasized from several of the cited cases is the application of the "dual purpose doctrine" to the scope of employment question. As stated in the *Restatement (Second) of Agency*, Section 236: "Conduct may be within the scope of employment, although done in part to serve the purposes of the servant or a third person."¹¹⁶

The fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment. If the purpose of serving the master's business benefits the servant to any appreciable extent, the master is subject to liability if the act otherwise is in furtherance of the master's business.¹¹⁷ In jurisdictions that have adopted the "dual purpose doctrine,"

(9th Cir. 1966); *Johnston v. United States*, 310 F. Supp. 1 (N.D. Ga. 1969); *Platis v. United States*, 288 F. Supp. 254 (D. Utah 1968), *aff'd*, 409 F.2d 1009 (10th Cir. 1969).

109. 395 U.S. 258 (1969).

110. *Id.* See *Relford v. Commandant*, 401 U.S. 355 (1971).

111. See *Hallberg v. Hilburn*, 434 F.2d 90 (5th Cir. 1970); *O'Brien v. United States*, 236 F. Supp. 792 (D. Me. 1964).

112. See *United States v. Romitti*, 363 F.2d 662 (9th Cir. 1966); *Cooner v. United States*, 276 F.2d 220 (4th Cir. 1960); *Hinson v. United States*, 257 F.2d 178 (5th Cir. 1958).

113. 483 U.S. 435 (1987).

114. See *Morrow, Solorio v. United States: The Death and Burial of "Service-Connection" Jurisdiction*, 28 A.F.L. REV. 201 (1988).

115. See *RESTATEMENT (SECOND) OF AGENCY*, § 239, comment (b) (1958).

116. *RESTATEMENT (SECOND) OF AGENCY*, § 236 (1958).

117. *Id.*

the totality of the factual circumstances are reviewed to determine whether, at the time of the accident, the employee had abandoned and turned *completely* away from his master's business to engage in a purely personal purpose.¹¹⁸ Thus, where a legitimate business purpose coexists with the personal purpose of the employee and the employee has not completely abandoned his master's business, liability may be imposed on the employer notwithstanding the employee's personal motives.¹¹⁹

Non-Vehicular Cases. Naturally, scope of employment issues also arise in situations where there is no question concerning the use of an automobile. The following cases are provided to illustrate how scope of employment can become a critical issue in other factual settings.

Law Enforcement Officials. A number of courts have found actions of federal law enforcement officials that caused injury to others to have occurred within the scope of employment. For example, in *Hatahley v. United States*¹²⁰ federal agents were held to be in the scope of their employment when they wrongfully confiscated and destroyed horses belonging to the plaintiffs. At the time, the horses were grazing on public lands. The agents, seeking to prevent unlawful grazing on federal range land, had rounded up plaintiffs' horses pursuant to a state statute that provided that "abandoned" horses on the open range could be eliminated. The agents either sold or destroyed a total of 115 horses of which 38 belonged to the plaintiffs. The court initially determined that the state statute had not been properly invoked and that the agents acted without authority. The court found that, under Utah law, an employer could be liable for the willful torts of his employee if the acts were committed in the furtherance of the employer's interests or if the use of force could have been contemplated in the employment. The court held that both conditions had been met and imposed liability. The court pointed out that there were situations in which a government agent, like a private individual, could act beyond his actual authority and yet remain in the scope of his employment.¹²¹

In *Stewart v. United States*,¹²² a Border Patrol Inspector fired a shot at some dogs who were disturbing him as he was writing a report at four o'clock in the morning. Across the street, the plaintiff was sleeping in an open vegetable stand. The bullet fired by the inspector ricocheted across the highway and struck plaintiff in the upper left arm and skull, leaving fragments in his brain and causing permanent injury. The court found that the border guard's duties included keeping the peace, removing any disturbances, and making reports on employees in a speedy and accurate manner. Based on these facts, the court concluded that the guard purposely fired his pistol with the intent of scaring the dogs away so that they would no longer disturb him while he was writing his reports. Therefore, the court held the border guard was acting in the scope of his employment at the time he fired the pistol.¹²³

Finally, in *Thompson v. United States*,¹²⁴ a Comprehensive Employment Training Act (CETA) Indian tribal police trainee accidentally shot and killed plaintiff's son at the Bureau of Indian Affairs (BIA) police station. The trainee was practicing his

118. See *Prince v. Creel*, 358 F. Supp. 234, 237 (E.D. Tenn. 1972).

119. For a general discussion of the "dual purpose" doctrine, see, e.g., *Berrettoni v. United States*, 436 F.2d 1372 (9th Cir. 1970); *McGarrah v. United States*, 294 F. Supp. 669 (N.D. Miss. 1969); *Kimball v. United States*, 262 F. Supp. 509 (D.N.J. 1967).

120. 351 U.S. 173 (1956).

121. *Id.*

122. 201 F.2d 135 (5th Cir. 1953).

123. *Id.* See also *Cerri v. United States*, 80 F. Supp. 831 (N.D. Cal. 1948) (Sentry who fired a shot while attempting to halt a civilian escaping from arrest was found to be in scope of employment). Cf. *United States v. Jasper*, 222 F.2d 632 (4th Cir. 1955) (Military policeman, being threatened by an angry crowd, fired into ground with bullet striking an innocent bystander. Court found no negligence.)

124. 504 F. Supp. 1087 (D.S.D. 1980).

"quick draw" technique with a BIA-issued handgun in the station house. He was found to be in the scope of this employment despite the strict prohibition against this type of activity.¹²⁵

Illegal Acts. There is a consensus that illegal acts will normally take an employee out of the scope of his employment. For example, in *Doe v. United States*,¹²⁶ an Air Force social worker sexually abused a minor during an unauthorized physical examination. The court held he was not in the scope of employment as a social worker at the time of the assault in that he was only furthering his own self-interest in conducting the examination.¹²⁷ In *Thigpen v. United States*,¹²⁸ a minor child was sexually assaulted by a Navy corpsman while in a naval hospital. The court held that the corpsman was not acting in the scope of his employment, because his normal duties did not include assaults on minor children and he was not furthering the Navy's interest at the time of the assault. Rather, he was pursuing his own self-interest.¹²⁹ In *Doe v. United States*,¹³⁰ an Air Force major was counseling the female plaintiff when he exposed himself to her and suggested sexual conduct. The court stated that exposure was not a part of the plaintiff's counseling and the major was acting in his own self-interest in doing so. Therefore, the court held the major was not in the scope of his employment.¹³¹

Similarly, if an employee steals explosives that subsequently cause injuries to a third person, the employee's conduct is outside the scope of his employment.¹³² In *Garza v. United States*,¹³³ an Air Force member stole a "ground burst simulator" that had been intended for use during training exercises to simulate battlefield conditions. The airman found the explosive on the site a few days after the exercise while performing his duties "policing" the area as a firefighter. He hid the device from his supervisor and took it to his off-base apartment where it remained hidden for a period of eighteen months. When he moved, a cleaning woman and her son entered the apartment. The thirteen-year-old boy found the device, broke it apart, and stuck a lighted match to it. The simulator exploded burning the youth in the process. The court stated that the airman's "act of removing the simulator from the base was a criminal act . . . [which] . . . broke the proximate cause chain unless it can be said that the theft was foreseeable."¹³⁴ The court held the airman was not acting in the scope of his employment, distinguishing it from their earlier decision in *Williams v. United States*.¹³⁵ In *Williams*, a soldier inadvertently carried an explosive device from field exercises to his home where it was later found by a teenager who was injured when it exploded. The court imposed liability on the Government in *Williams* based on the officer's negligence in carrying off the simulator. In *Garza*, the court declined to impose liability, because the criminal acts of the airman took him outside the scope of his employment.¹³⁶

125. *Id.*

126. 618 F. Supp. 71 (D.S.C. 1985).

127. *Id.*

128. 618 F. Supp. 239 (D.S.C. 1985), *aff'd*, 800 F.2d 393 (4th Cir. 1985).

129. *Id.*

130. 618 F. Supp. 503 (D.S.C. 1984), *aff'd*, 769 F.2d 174 (4th Cir. 1985).

131. *Id.*

132. See generally 2 L. JAYSON, *supra* note 6, § 216.04.

133. 809 F.2d 1170 (5th Cir. 1987).

134. *Id.* at 1175.

135. 352 F.2d 477 (5th Cir. 1965), *appeal after remand*, 405 F.2d 234 (1968).

136. *Id.* See also *Voytas v. United States*, 256 F.2d 786 (7th Cir. 1958) (Soldier stole explosives from base in Virginia and took them to Chicago while on leave. Soldier then gave to a civilian, causing injury.). *Gordon v. United States*, 180 F. Supp. 591 (Ct.Cl. 1960) (Soldier on leave stole grenades in North Carolina and detonated them in a bar in New York.)

However, a number of courts have found that illegal acts were committed by federal employees while they were acting in the scope of their employment. Sections 230 of the *Restatement (Second) of Agency*¹³⁷ states that "[a]n act, although forbidden, or done in a forbidden manner, may be within the scope of employment." Section 231 provides that "[a]n act may be within the scope of employment although consciously criminal or tortious."¹³⁸

For example, in *Malicote v. McDowell*,¹³⁹ plaintiff alleged that a federal mine service employee intentionally ran over plaintiff's pet goats while conducting a federal strip mine inspection. The employee was held to be in scope of his employment because the act occurred while the federal employee was in natural the course of conducting an inspection pursuant to federal law despite the fact that the employee's actions may have been illegal and even expressly forbidden by the employer.¹⁴⁰ In *Cruikshank v. United States*,¹⁴¹ CIA agents were found to have been illegally opening mail in the performance of their duties. The court stated that section 1346(b) of the FTCA was set up to prevent the imposition of liability on the United States for acts which are committed by employees when they are not on duty, but held the agents were acting in the scope of their employment while conducting the illegal activities.¹⁴²

A further example of a court finding scope of employment to impose liability on the Government is *Simmons v. United States*.¹⁴³ In *Simmons*, an Indian health service counselor wrongfully engaged in a sexual relationship with a patient who was seeking mental health counseling. The court held that the counselor was in the scope of his employment, stating

Washington agency law has long held that a master cannot excuse himself when any 'authorized act was improperly or unlawfully performed'. . . nor can he excuse himself when an unauthorized act is done in conjunction with other acts which are done within the scope of duties the employee is instructed to perform.¹⁴⁴

Applying this test, the court held that the counselor "was employed to provide mental health counseling and although he was not authorized to become sexually involved with his clients, that contact occurred in conjunction with his legitimate counseling activities and thus [was] within the [scope of employment]."¹⁴⁵

Miscellaneous Cases. Other cases illustrate the limitless variety of situations in which scope of employment issues arise. For example, in *Nichols v. United States*,¹⁴⁶ an intoxicated Job Corps enrollee bit the finger of a security guard who was escorting him to an isolation cell. The bite resulted in amputation of the guard's finger. The court held that the Job Corps enrollee was not in the scope of his employment when he bit the guard's finger, because he was drunk at the time, requiring isolation, and his actions could not be said to further the purposes of the Job Corps Act.¹⁴⁷

137. RESTATEMENT (SECOND) OF AGENCY, § 230 (1958).

138. *Id.* at § 231.

139. 479 F. Supp. 63 (E.D. Tenn. 1979).

140. *Id.*

141. 431 F. Supp. 1355 (D. Haw. 1977).

142. *Id.*

143. 805 F.2d 1363 (9th Cir. 1986).

144. *Id.* at 1369 citing *Pierson v. United States*, 527 F.2d 459 (9th Cir. 1975).

145. *Id.* at 1369. *Cf. with Focke v. United States*, 597 F. Supp. 1325 (D. Kan. 1982) (Veteran's Administration social worker engaged in sexual acts with patient's wife and daughter.); *Turner v. United States*, 595 F. Supp. 708 (W.D. La. 1984) (National Guard recruiter deceived female plaintiffs into believing that they had to undergo complete "on the spot" physical exams to be performed by him.)

146. 612 F. Supp. 1194 (D.N.M. 1985).

147. *Id.*

In *Claypool v. United States*,¹⁴⁸ a camper and his family paid the park entrance fee and drove to a campground within Yellowstone National Park. There, they contacted a park ranger to determine whether it was safe to sleep outside. Having been assured that it was safe, the camper and his family slept outside in a tent. After traveling throughout the park, the family returned two nights later. Because they had seen several bears on the road as they drove, the camper and his wife again asked a park ranger whether it was safe to sleep in sleeping bags in a tent. The ranger explained that hundreds of people slept outside every night, no one had been attacked without provocation; and bears would not come around unless the campers had food in the area. The camper and his family slept in their tent after making sure no food was left in their automobile or tent. That night, while the camper slept, a bear ripped a hole in the tent and attacked the camper, biting his leg. Subsequently, evidence revealed that bears had raided the same campground three days before the camper was attacked, injuring several campers as they slept. The court found that all of the park rangers knew of the previous attack and yet none of them told the camper or his family. In holding that the park ranger was in the scope of his employment when he gave wrong advice, the court pointed out that a brochure published by the park stated the park rangers provided protection for the park; the rangers were responsible for law enforcement; and they handled information. The pamphlet advised campers to "[c]onsult the men in uniform—they are at your service."¹⁴⁹

In *Craft v. United States*,¹⁵⁰ a child was injured by a soldier who was operating a power lawnmower outside his quarters on an Army post. The court held that the soldier was in the scope of his employment at the time he was cutting the grass. In reaching this conclusion, the court noted that the soldier was performing an assigned duty in cutting his portion of the lawn; the duty was specified in written regulations and confirmed in an oral briefing detailing his responsibilities in maintaining the condition of his quarters; he was given a direct order for which he was subject to military discipline; his only choice in the matter was the type of mower to be used; and he was receiving a governmental subsidy through his living quarters. Finally, the court held that there was no landlord-tenant relationship between the soldier and the Army that would preclude recovery from the landlord for a tenant's tort.¹⁵¹

III. NINTH CIRCUIT EXPANSION

The cases and statutory provisions referred to previously illustrate the vast array of situations that can be encountered, and the difficulty in assessing the scope of employment issue in each particular case. To complicate the matter further, a series of decisions handed down by the Ninth Circuit Court of Appeals has cast doubt on the sanctity of the scope of employment requirement under the FTCA.

A. *Lutz v. United States*

In *Lutz v. United States*,¹⁵² the two-year-old plaintiff resided with her family in base housing on Malmstrom Air Force Base, Montana. The family lived in one of a series of small mobile homes surrounded by unfenced grassy areas. The homes were situated close to each other with barriers erected to separate them. Base housing

148. 98 F. Supp. 702 (S.D. Cal. 1951).

149. *Id.*

150. 542 F.2d 1250 (5th Cir. 1976).

151. *Id.*

152. 685 F.2d 1178 (9th Cir. 1982).

residents were permitted to have pets under the guidance of a base regulation which stated, in part: "The control of a pet is the owner's responsibility. When outside of the owner's quarters, pets will be kept on a leash or chain or under the direct voice control of a responsible person. Pets found wandering on base will be picked up by the Security Police wherever possible."¹⁵³

The base commander testified that the purpose of the regulation was "to promote health and safety on the base, and to assure that residents did not infringe on their neighbor's rights."¹⁵⁴ The regulation was enforced by the security police, and persons who failed to comply with the regulations were subject to military discipline.¹⁵⁵

Airman Harris lived next door to the Lutz family. Harris kept several dogs at his home, including a wolf-malemute crossbreed named "Satan." Although the dog was generally chained to Harris's mobile home, it apparently escaped and entered the Lutzes' yard where plaintiff and her sister were playing. Plaintiff was attacked by Satan resulting in several bite wounds to her face and shoulders.

The district court held that "[i]n keeping the animal which caused the tragic injuries. . . Harris was not acting in the line of duty, but, rather, was acting for his own benefit."¹⁵⁶ The appellate court found that, under Montana law, "an employee who acts entirely for his own benefit is generally held to be outside the scope of his employment, and his employer is relieved of liability. . . ."¹⁵⁷

The Court of Appeals indicated that the district court erred in focusing on ownership of the dog to determine scope of employment.¹⁵⁸ The court stated that the acts or omissions of Harris in controlling the dog gave rise to the claim of negligence, and the scope of employment analysis should be applied to those facts instead. They stated:

We view base security as a regular military activity. Clearly, the employee to whom the security duty is delegated cannot be said to act entirely for his own benefit. Upon assignment of the duty, the employee who controls his dog acts in furtherance of his employer's interest in promoting order and safety on the base. We conclude that this security duty was delegated to Airman Harris, and thus controlling the dog was within the scope of his employment.¹⁵⁹

The court went on to hold that "[m]ilitary housing presents a unique situation. Unlike employees of cities and towns, the employment relationship of residents of military bases continues even during the off-duty, at-home hours."¹⁶⁰ The court based its holding on the earlier decision in *Craft* stating:

Because the *Craft* soldier performed a specifically assigned duty enforced through the threat of military discipline, he acted within the scope of his employment. The instant case also raises special factors peculiar to the military employment situation. Based on those factors, we hold that Harris was delegated a specific military duty, the performance of which furthered the interest of the Air Force, and that he therefore acted in the line of duty and within the scope of his employment.¹⁶¹

153. *Id.* at 1181.

154. *Id.* at 1182.

155. *Id.* at 1181.

156. *Id.* at 1182.

157. *Id.* citing *Kornec v. Mike Horse Mining & Milling Co.*, 120 Mont. 1, 180 P.2d 252, 256 (1947). The court also noted "the fact that the employee deviates from express instructions or acts 'in utter disobedience thereof' generally does not relieve the employer of liability," citing *Keller v. Safeway Stores, Inc.*, 111 Mont. 28, 108 P.2d 605, 611 (1940).

158. *Id.* at 1182.

159. *Id.* at 1183.

160. *Id.*

161. *Id.*

Further, the appellate court analogized the base regulation to a municipal leash ordinance enacted "to promote the general welfare of residents." In reviewing Airman Harris' actions, the court held that he would be liable as a private citizen based upon a Montana statute that imposed liability of a dog owner for any unprovoked bite. The court found that the standard of reasonable care was established by the language in the base regulation which mandated total control of pets. Thus, in that the dog was not under control when the plaintiff was bitten, there was a breach of the standard of care under Montana law. Finally, given that the base regulation was equivalent to a municipal ordinance, the violation satisfied the requirements of the Montana "negligence per se" rule, resulting in the United States being negligent as a matter of law.¹⁶²

B. Doggett v. United States

*Doggett v. United States*¹⁶³ arose when the plaintiff was injured in an automobile accident caused by an intoxicated naval enlisted member. On October 6, 1983, Machinist's Mate Third Class (MN3) Mark Gorman was stationed at the Naval Weapons Station in Seal Beach, California. After completing his work for the day, MN3 Gorman stopped by an on-base club facility known as Bunker 33. While at the club, Gorman consumed two bottles and eight or ten glasses of beer between 3:30 and 7:20 p.m. MN3 Gorman had been drinking in the company of five Navy acquaintances, including at least two senior petty officers from his unit. After leaving Bunker 33, Gorman drove off base through the main gate of the Naval Weapons Station. Approximately twenty minutes later, Gorman crossed the center-line of Pacific Coast Highway and struck plaintiff's vehicle. Doggett suffered severe and disabling injuries, including brain trauma, broken bones, partial paralysis, and loss of visual, verbal and mental acuity.¹⁶⁴

MN3 Gorman was charged with several violations relating to driving while intoxicated resulting in death or injury. He plead "no contest" and was sentenced in state court. Plaintiff sued on theory that the Navy was negligent in allowing Gorman to drive off the Naval Station while intoxicated. The district court dismissed the action holding the United States was immune from liability for providing alcohol, and that California imposed no duty to control the conduct of another.¹⁶⁵

162. *Id.* at 1184. The court analogized the base regulation to that promulgated by a small town and equated the regulation to a city ordinance. The FTCA is a limited waiver of sovereign immunity subjecting the United States to liability "if a private person would be liable . . . in accordance with the law of the place of the wrong." 28 U.S.C. § 1346(b). Where there is not an analogous cause of action arising from the conduct of a private individual, the courts have taken two approaches. Many states hold that it is improper to go beyond the intent of a "limited waiver" and analogize to local law pertaining to the activities of a state or municipality. *See, e.g., Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955) (Rejected attempt to impose liability on United States as if it were a municipal corporation.); *Proud v. United States*, 723 F.2d 705 (9th Cir. 1984), *cert. denied*, 467 U.S. 1252 (1984) (FTCA liability must be based on a similarly situated private landowner and not a government landowner); *Schindler v. United States*, 661 F.2d 552 (6th Cir. 1981) (FTCA requires application of state law relating to private individuals and not municipal corporations.). *But see Doggett v. United States*, 875 F.2d 684, at 689, 693 (9th Cir. 1989) citing *Louie v. United States*, 776 F.2d 819, 825 (9th Cir. 1985) (Court in *Doggett* stated that analysis of actions involving "unique governmental functions" rests on "determin[ing] what liability state law attaches to similar activities undertaken by analogous entities subject to its jurisdiction.") The approach taken by the Ninth Circuit appears to reject the mandate set forth in the FTCA that liability be premised on "private individual" standards.

163. 875 F.2d 684 (9th Cir. 1989).

164. *Id.* at 686.

165. *Id.*

The Ninth Circuit analyzed the scope of employment of three categories of employees: the bartender at Bunker 33; the security guard who permitted MN3 Gorman to drive through the gate; and the Navy personnel with whom Gorman spent the afternoon drinking. In evaluating the status of each, the court applied the law of the situs stating:

California law of *respondeat superior* defines the scope of employment very broadly An employee need not be engaged in the ultimate object of his employment at the time of the wrongful act for liability to be attributed to the employer but the employer is not vicariously liable if the employee substantially deviates from his duties for personal purposes ¹⁶⁶

The determination as to whether an employee committed a tort during the course of his employment turns on whether 1) the act performed was either required or 'incident to his duties' . . . , or 2) the employee's misconduct could be reasonably foreseen by the employer in any event.¹⁶⁷

Given the pleadings by the parties, the court declined to discuss the issue of MN3 Gorman's negligence. However, *in dictum*, the court intimated that the Government would have been subject to *respondeat superior* liability for his actions on a "social host" dramshop theory.¹⁶⁸ The court quickly disposed of the bartender and the security guard finding that both were clearly in the scope of their employment, the bartender while serving beers at Bunker 33 and, the guard when he allegedly negligently allowed Gorman to drive off base.

The court faced the most difficulty with the status of Gorman's off duty drinking companions. In determining their respective employment status while allegedly negligently failing to prevent Gorman from driving while intoxicated, the court relied on their earlier decision in *Lutz*¹⁶⁹ and the Navy regulation under which the Bunker 33 club operated. The court stated:

Because Bunker 33 is operated by the Navy for the recreational use of military personnel, and because the Navy has promulgated regulations governing the treatment of persons under the influence of alcohol, we conclude that the petty officers who observed Gorman drinking were within the scope of their employment Here, the regulation governing the treatment of persons under the influence of alcohol is a comparable security regulation [to the one found in *Lutz*] which delegates the responsibility for enforcement to military personnel with responsibility for security matters and to those with supervisory or command authority. The performance of this specific military duty furthers the interests of the Navy and any lapse in performance occurs in the line of duty and within the scope of employment.¹⁷⁰

The regulation, in part, mandated that persons thought to be intoxicated were to be detained, referred to the dispensary, and prohibited from driving until sober.¹⁷¹ The court specifically found that the regulation did not govern off-base conduct nor did it apply to nonsupervisory, nonsecurity personnel.¹⁷² After reviewing the issue of whether each category of persons was in the scope of their employment, the court turned next to the issue of duty.¹⁷³

166. *Id.* at 687 citing *Kimberly M. by Cobbs v. Los Angeles Unified School Dist.*, 196 Cal. App. 3d 1506, 242 Cal. Rptr. 612, 617 (1987).

167. *Id.* at 687 citing *Jeffrey Scott E. v. Central Baptist Church*, 197 Cal. App. 3d 718, 243 Cal. Rptr. 128, 129 (1988).

168. *Id.* at 687.

169. 685 F.2d 1178 (9th Cir. 1982).

170. *Doggett*, 875 F.2d at 688.

171. *Id.* at 688, n.1.

172. *Id.* at 688. *Cf. with Hartzell v. United States*, 786 F.2d 964 (9th Cir. 1986) (Violation of safe driving regulation while off base.)

173. *Id.* at 688. (Stating that the enlisted personnel drinking with Gorman were not subject to a

Notably, the court found that the Navy voluntarily adopted the regulation designed to prohibit intoxicated persons from driving off the installation. Therefore, the court concluded that "[b]ecause the regulation both prohibits the conduct at issue and undertakes to provide care to drunken personnel, we conclude that the government assumed the responsibility to 'perform its' good Samaritan task in a careful manner."¹⁷⁴ The court stated that if the petty officers subject to the regulation knew, or should have known, that Gorman was intoxicated and negligently failed to care for him in accordance with the requirements of the regulation, the Government would be liable. Therefore, the Ninth Circuit remanded to the district court to determine whether the security guard or the drinking companions had breached any duty of care owed to the plaintiff.¹⁷⁵

C. Washington v. United States

On February 21, 1989, the Ninth Circuit Court of Appeals rendered its decision in *Washington v. United States*.¹⁷⁶ On September 19, 1980, Larry Bertole and Neil Cleaves were working in the garage of Cleaves' residence on the Point Magu, California, Naval Base attempting to start the engine of Cleaves' 1964 Rambler. Bertole and Cleaves were active duty members of the Navy on authorized liberty, having completed their duty earlier in the day. While attempting to start the car, "neither Mr. Bertole nor Mr. Cleaves [were] performing any action connected with any of their official duties."¹⁷⁷ Bertole was pouring gasoline from a coffee can into the carburetor to prime it when the engine backfired. Flames shot from the carburetor, igniting the gasoline in the can Bertole was holding. Bertole jerked the can back, spilling gasoline and catching his hand on fire. Bertole turned toward the side door of the garage, tripped, and spilled the can of flaming gasoline out the door. At the same time, ten-year-old Christa Washington was playing just outside the garage door in an adjacent yard. When Bertole dropped the can, Christa was struck by the flaming gasoline and severely burned.¹⁷⁸

The district court held that "[n]o act or omission of any employee of the United States of America, while acting within the course and scope of his office or employment, caused, or in any way contributed to the accident."¹⁷⁹ The court first noted that "[s]cope of employment for an active duty military employee means 'acting in the line of duty.'"¹⁸⁰ The phrase 'line of duty,' in turn, is defined by the applicable state law of *respondeat superior*.¹⁸¹ The court then concluded that,

state duty to detain or control him, the court refused to decide whether they were acting in the scope of their employment.)

174. *Id.* at 694 citing *Sheridan v. United States*, 487 U.S. 392 (1988); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

175. Dissent rejected the approach of the majority, stating,

[a] good Samaritan duty does not arise merely through the adoption of a regulation It is hornbook law that the good Samaritan duty arises with the performance of specific acts of rescue which induce reliance on the aid of the actor. I do not read *Sheridan* as modifying the traditional concept of good Samaritan duty so that all that it requires is the voluntary adoption of regulations. Rather the Court says that by the voluntary adoption of a regulation and by further voluntarily undertaking to provide care the government assumed the good Samaritan duty.

875 F.2d at 694.

176. 868 F.2d 332 (9th Cir. 1989), *cert. denied*, ___, U.S. ___, 110 S.Ct. 539 (1989).

177. No. CV 83-2332-RSWL (C.D. Cal. Dec. 14, 1987).

178. 868 F.2d at 333.

179. No. CV 83-2332-RSWL (C.D. Cal. Dec. 14, 1987).

180. *Id.*

181. *Id.*

under the principles of *respondeat superior*, in California, the acts of Mr. Bertole and Mr. Cleaves herein, in attempting to start the privately owned Rambler automobile in their off duty hours, were clearly their own, and done for personal purposes, totally unrelated to any United States Navy job or duty[,] . . . [and] thus [were] not within the course and scope of the employment of Mr. Bertole and Mr. Cleaves with the United States.¹⁸²

The district court concluded that:

The imposition of *respondeat superior* liability upon the United States in this case would clearly be an imposition upon the military of a liability far broader than that of a private employer, and would be clearly contrary to the limited waiver of sovereign immunity intended by the Federal Tort Claims Acts.¹⁸³

As an aside, the court also declined to impose liability based on an analysis of landowner duties stating the United States "had no knowledge of the danger, [and did not] participate in any way in creating it."¹⁸⁴

The Ninth Circuit Court of Appeals reversed.¹⁸⁵ The court relied on base regulations in effect at the time of the accident that provided that housing residents were not to conduct "*Fire Hazardous Operations* . . . prior to the establishment of adequate fire prevention measures."¹⁸⁶ In reviewing the issue of scope of employment, the court added that, in *Lutz v. United States*, it had concluded that "[m]ilitary housing presents a unique situation,"¹⁸⁷ and in that case found that "control of a serviceman's dog was. . . a military duty imposed for the benefit of the Air Force by Air Force regulations on the dog's owner who was in base housing."¹⁸⁸ The court here held:

In our case the duty to adhere to fire regulations and not to engage in fire hazardous operations without the establishment of adequate fire prevention measures was a military duty imposed for the benefit of the Navy by Navy regulations. . . . The Navy is therefore responsible for [Bertole's and Cleaves'] actions.¹⁸⁹

After concluding that Bertole's and Cleaves' actions violated the governing regulations, the court remanded "for the limited purpose of determining" the amount of respondents's damages.¹⁹⁰ Thus, the Ninth Circuit decided the acts of the servicemen violated existing base regulations and, in so doing, placed them in the scope of their employment when the injury to the civilian plaintiff occurred.¹⁹¹ The Supreme Court denied the United States' petition for *certiorari* on December 4, 1989.¹⁹²

IV. REACTION IN OTHER CIRCUITS

A. *Nelson v. United States*

The case of *Nelson v. United States*,¹⁹³ presented facts strikingly similar to those in *Lutz*.¹⁹⁴ The case arose in April 1983 at Bolling Air Force Base in the District of

182. *Id.*

183. *Id.*

184. *Id.*

185. 868 F.2d at 334.

186. *Id.* at 333.

187. *Id.* at 334.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. ___ U.S. ___, 110 S.Ct. 539 (1989).

193. 838 F.2d 1280 (D.C. Cir. 1988).

194. 685 F.2d 1178 (9th Cir. 1982).

Columbia. Tracey Nelson, then nine years old, lived in base housing assigned to her active duty Navy father who was temporarily assigned to Japan. Quarters nearby had been assigned to Air Force Sergeant Clyde Casey and his family. At the time, Casey was stationed in Greenland while his family remained in the United States. Casey's family kept a family dog, named Rocky, a sixty-five-pound German Shepherd. As Tracey and a friend approached the backyard of Casey's residence, Sgt Casey's eighteen-year-old-son, Robert, was in the yard with Rocky, trimming the grass. Tracey stopped alongside the four-foot fence surrounding the Casey yard to ask Robert about a ball her brother had lost. As Tracey waited, Rocky approached the opposite side of the fence without attracting attention. The dog rose and lunged at Tracey, biting her on the face, resulting in severe injuries. Tracey required extensive reparative and cosmetic surgery and was permanently disfigured with ongoing eye problems.

Plaintiff filed suit alleging that Sgt Casey had acted negligently within the scope of his employment in failing to control the family dog in violation of a base regulation, and that base security personnel were negligent in failing to remove the dog from the base despite at least two prior incidents in which the dog had scratched or bitten children.¹⁹⁵ Relying on the reasoning in *Lutz*, the district court concluded that Sgt Casey's decision to own a dog was personal and not within the scope of his employment.¹⁹⁶ However, the court held that Sgt Casey was acting within the scope of his employment in failing to prevent the injury to Tracey. Therefore, the court imposed liability on the Government for Sgt Casey's actions.¹⁹⁷ The court also found the security personnel negligent in permitting Sgt Casey to keep the dog on base.¹⁹⁸

In a decision written by Judge Bork, the Court of Appeals sharply criticized both the *Lutz* rationale and, inferentially, the decision in *Craft v. United States*¹⁹⁹ that provided the basis for the *Lutz* decision. The court reviewed the difference between regulations governing employees and regulations governing residents. After noting that, in addition to pet-control requirements, base regulations "require[d] base residents to use certain size pots and pans, to replace electrical fuses, and to refrain from smoking in bed," the court stated "[t]hese duties are not imposed by the military in this role as an employer and they do not run to the employer's benefit."²⁰⁰

The court recognized that, "[u]nder *Lutz*, all duties imposed by military regulation, no matter how trivial, could fall within the serviceman's line of duty and thus within the employer-employee relationship."²⁰¹ The Court of Appeals expressly disagreed with this approach, stating:

There seems . . . to be no principled limit to the reasoning in *Lutz*, so that the case would seem to make the government an insurer as to all manner of bizarre incidents To hold the government potentially liable for all damage by conduct on a military base that violates any one of the many base regulations would expand liability in ways inconsistent with the idea that the FTCA must be strictly interpreted as a limited relinquishment of sovereign immunity.²⁰²

The court further criticized the *Lutz* approach by noting that "whether a breach of military regulations subjects the government to tort liability must depend upon

195. 633 F. Supp. 1263, 1266 (D.D.C. 1986).

196. *Id.* at 1267.

197. *Id.*

198. *Id.* at 1269.

199. 542 F.2d 1250 (5th Cir. 1976).

200. 838 F.2d at 1283-84.

201. *Id.* at 1283.

202. *Id.* at 1284.

whether analogous duties exist under local tort law."²⁰³ Thus, it rejected the notion that military bases are unique, so that state law need not be consulted in determining whether the United States is liable under the FTCA.

After holding that Sgt Casey was not in the scope of his employment, the court went on hold that the Government was liable as the landowner for failure to control or remove a dog that responsible officials knew was dangerous.²⁰⁴

B. Piper v. United States

In October 1989, the Eighth Circuit Court of Appeals decided the case of *Piper v. United States*.²⁰⁵ The case arose at Little Rock Air Force Base, Arkansas, in January 1986. At the time, Matthew Duran was living in base housing with his mother who was serving as an enlisted member of the National Guard. Air Force Technical Sergeant Robert Williams lived nearby with his family and a large airedale dog named Arby.

On 18 January, Matthew was returning from school on the bus when he noticed Arby sitting at the rear patio glass door and barking at dogs inside his own home. Matthew called for the dog to follow him to Williams' home. The dog attacked Matthew, knocked him to the ground and bit him on the forehead and scalp. Matthew's mother brought suit alleging the Government was liable on the same two theories alleged in *Nelson*, that "TSgt Williams had acted negligently in the line of duty by failing to maintain control over Arby. . . [and/or]. . . that air base personnel responsible for maintaining order on base had negligently permitted Arby to remain on base when they knew or should have known of his dangerous propensities."²⁰⁶

The district court relied on *Lutz* to hold that Sgt Williams was acting in the scope of his employment because base regulations delegated to him the duty to control his dog. In reaching this result, the court determined that violation of the regulation (relating to control of pets) by Williams amounted to negligence in the line of duty.²⁰⁷

After recognizing that the district court had relied upon the *Lutz* rationale to impose liability on the United States, the Eighth Circuit Court of Appeals sharply criticized this approach stating:

This reasoning will not stand. Military bases regulate a wide variety of subjects, some of them trivial, such as housekeeping. It stretches the statute too far to say that any act or omission by a servicemember, if covered by a regulation, represents conduct in the line of duty. . . . In this case and in many cases, connection between the duty imposed by the regulation and military service is far too tenuous to conclude that the FTCA applies.²⁰⁸

Referring to the reasoning set forth in *Nelson*, the court stated "[w]e believe this analysis is sound and adopt it. Accordingly, the United States is not derivatively liable under the FTCA for negligence on the part of TSgt Williams."²⁰⁹ Because the district court had not decided the issue of liability under a landowner theory, the court remanded the case for further findings.²¹⁰

203. *Id.*

204. *Id.* at 1285-86.

205. 887 F.2d 861 (8th Cir. 1989).

206. *Id.* at 863.

207. *Id.*

208. *Id.* at 863-64.

209. *Id.* at 864.

210. *Id.*

C. Shaffer v. United States

In a case factually similar to *Doggett*, the Tenth Circuit Court of Appeals refused to impose liability on the United States in *Hope Shaffer v. United States*.²¹¹ The action arose from a fatal automobile accident on May 30, 1987, near Silver City, New Mexico.

Airman Leroy Norlander was permanently stationed at Norton Air Force Base, California. He had been sent as part of a group on a temporary duty assignment to a radar site northeast of Silver City. The group on temporary duty resided in three separate apartment complexes in Silver City with each residence assigned control of a government-owned vehicle. On May 29, Norlander and his roommates returned to their residence in the Plaza Apartments at the end of the work day. In the early evening, they went to the Juniper Apartment where some of their co-workers lived. In accordance with Air Force regulations, one of Norlander's roommates (Roberson) was assigned as "designated driver" for the vehicle under their control.

At the second apartment, the men were drinking beer and other alcoholic beverages, visiting, and watching television. The district court stated that "this impromptu party was not a military function." Sometime during the evening, Norlander requested the vehicle keys from Roberson to go on a "beer run." Roberson refused. Norlander then located the keys to the vehicle assigned to the Juniper Apartment and drove to the store with Sgt Moore. Upon his return, Norlander retained the keys. At about 2:00 a.m., Norlander was tired, intoxicated, and wanted to return to his own apartment. When his roommates refused to leave, Norlander drove off with the Juniper Apartment vehicle, planning to drive to the Plaza Apartment. Shortly after departing, the accident occurred resulting in plaintiff's death. Blood alcohol tests determined that both Norlander and the plaintiff were intoxicated. Subsequently, Norlander was tried and convicted by the Air Force at a General Court-Martial.²¹²

Plaintiffs filed suit seeking recovery from the United States on three counts: the alleged negligence of Norlander acting within the scope of his employment; negligent entrustment; and negligent supervision. The district court initially stated that "[t]he fact that the driver was a government employee at the time of the accident or that the vehicle was a government vehicle is not enough to predicate liability of the United States under the FTCA."²¹³ After reviewing New Mexico law on scope of employment,²¹⁴ the court found that:

This case does not involve travel to or from a temporary duty station, nor travel to or from the work site. It involves an airman travelling from a friend and fellow employee's apartment. It is not disputed that Norlander and the rest of the men were off duty. They had returned to their respective quarters at the end of a work day. The unique relationship among ranking military personnel has little bearing upon determining whether the activity is within the scope of his employment.²¹⁵

The court determined that Norlander had no permission to take the vehicle and was acting "wholly from some external independent and personal motive." Therefore, the court held that "as a matter of law [he] was not acting within the scope of his duties at the time of the accident. Likewise, the alleged negligent entrustment and

211. No. 89-2139 (10th Cir. Feb. 9, 1990).

212. Civil Action No. 88-0375 HB (D.N.M. Feb. 10, 1989).

213. *Id.*

214. *Id.*

215. *Id.*

negligent supervision do not meet the FTCA's requirement that the tort be committed 'within the scope of employment duties,'²¹⁶

The Court of Appeals found no merit in "Plaintiff's theory . . . that the soldier's supervisor and his designee were acting within the scope of their authority and were thus 'on duty' when they negligently failed to enforce Air Force regulations and policies governing after-hours parties and driving privileges." The court affirmed the district court's granting of summary judgment in favor of the United States in that "neither the soldier-driver nor his superiors were acting in their 'line of duty' at the time"²¹⁷

IV. ANALYSIS AND CONCLUSION

The United States Government owns and operates thousands of vehicles and other equipment that could be involved in accidents, and employs hundreds of thousands of military and civilian personnel for whose negligent acts or omissions the United States might be liable. As previously stated, the object of this article has been to familiarize the practitioner with the general substantive law of the FTCA relating to scope of employment. It was meant to provide a starting point and general survey of the law for the analysis of an FTCA case. It is hoped that this article will enable the reader to recognize that the threshold question in any FTCA case is whether the federal employee was acting in the scope of his employment at the time of the alleged incident. The article was also intended to illustrate the increasing difficulty in analyzing cases arising in the Ninth Circuit.

The Ninth Circuit's approach to the scope of employment issue in the cited cases deviates from well-established law and circumvents the clear intent of the framers of the FTCA.

The cases expand the liability of the United States by making the Government responsible whenever damage results from conduct that violates a base regulation. In each instance, the court reversed a district court dismissal of the action based on a determination that an analogous private employee would not be liable under state law. The decisions effectively turn the United States into a virtual insurer of the conduct of servicemembers on military bases. However, as pointed out in *Nelson* and *Piper*, the Ninth Circuit has ignored the clear distinction between housekeeping or safety regulations and those regulations that govern the conduct of servicemembers on the job.

In each case, the Ninth Circuit erred in failing to consider whether an analogous private employer would be liable under state law.²¹⁸ In *Lutz*, the court stated that "[m]ilitary housing presents a unique situation."²¹⁹ In *Doggett*, the court "emphasize[d] that the regulation governs conduct only on the military base."²²⁰ In *Washington*, the only citation to state law was a case stating a general proposition of California law. As discussed in *Nelson*,²²¹ military bases are not unique. Rather, they are like a "company town." Private employers own property; they make rules governing the conduct of their employees while on that property, even when not on duty; and some private employers house employees and their families on company property.²²²

216. *Id.*

217. No. 89-2139 (10th Cir. Feb. 9, 1990).

218. 28 U.S.C. § 2674.

219. 685 F.2d at 1183.

220. 875 F.2d at 688.

221. 838 F.2d 1280 (D.C. Cir. 1988).

222. *Id.* at 1283.

Notably, the district court judge in *Washington* stated that "[t]he imposition of *respondeat superior* liability upon the United States in this case would clearly be an imposition upon the military far broader than that of a private employer" under California law.²²³ However, as stated, the Court of Appeals failed even to discuss substantive California law, relying instead on the *Lutz* rationale to impose liability.²²⁴ Likewise, as aptly pointed out in *Nelson* and *Piper*, the Ninth Circuit's reliance on military regulations is misplaced. The court's approach ignores the requirement of determining whether the breach of military regulation has an analogous duty under local tort law.

Contrary to the Ninth Circuit's assertion in *Lutz* that it was "not suggest[ing] that every act of a base resident is within the scope of his employment,"²²⁵ that is the clear message from the decisions in *Doggett* and *Washington*.

At least when there is a relevant base regulation, the prediction of Judge Bork in *Nelson* is being fulfilled in the Ninth Circuit—the Government has become "an insurer as to all manner of bizarre incidents" occurring on military bases.²²⁶ This appears to be the inevitable result from *Lutz* because "[m]ilitary regulations typically govern a wide range of base residents' activities, touching most aspects of private and public life."²²⁷ The potential impact of the *Lutz* rationale can best be illustrated by the fact that the Government maintains more than eighty-one military installations with more than 454,000 permanently assigned active duty military personnel throughout the Ninth Circuit.²²⁸ The Ninth Circuit's reasoning in *Lutz* and its progeny has been discredited by other circuits.²²⁹ The Supreme Court's refusal to review the decision in *Washington* left intact a decision which clearly stretches the limited waiver of sovereign immunity envisioned by the framers of the FTCA.

223. No. CV 83-2332-RSWL (C.D. Cal. Dec. 14, 1987).

224. 868 F.2d at 334. (In *Washington*, the only citation to state law was a case stating a general proposition of California law. *Id.* at 334 citing *Jeffrey Scott E. v. Central Baptist Church*, 197 Cal. App. 3d 718, 243 Cal. Rptr. 128, 129 (1988). However, analogous California law would not impose liability on the United States. *See, e.g., Martinez v. Hagopian*, 182 Cal. App. 3d 1223, 1230, 227 Cal. Rptr. 763, 767 (Cal. App. 1986) (Court refused to hold employer liable for a farmworker's tort since it would result in the imposition of "strict liability on the employer for all employee torts during after-hours social activities on the employer's premises, a result not permitted under settled law."))

225. 685 F.2d at 1183.

226. 838 F.2d at 1284. *Cf. with Merritt v. United States*, 332 F.2d 397, 399 (1st Cir. 1964), where the court rejected the argument that "anything [a serviceman] was doing in the residence was in the scope of his employment" in a case arising from a fire caused by a serviceman who was smoking in bed.

227. 838 F.2d at 1284.

228. *Guide to Military Installations*, Air Force Times (supplement), Apr. 2, 1990.

229. In addition to *Nelson*, *Piper*, and *Shaffer*, the *Lutz* rationale was specifically disapproved in *Brotko v. United States*, 727 F. Supp. 78 (D.R.I. 1989). Plaintiff brought action when she was bitten by a dog in a Navy housing project. The court discussed the similarity to the series of dog bite cases and the split in the decisions. After reviewing the precedents, the court stated *Lutz* stretches government liability beyond the sphere intended by the FTCA. The pet control regulation benefited the military housing community. "Although it may have benefited the government as a landlord, any benefit which inured to the government was merely incidental to the government's role as employer." *Id.* at 82.

The Loss of Chance Doctrine in Medical Malpractice

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I. INTRODUCTION

Consider the following scenario:

A patient goes into the hospital for an operation. As part of the pre-operation preparation, a chest x-ray is performed. The radiologist examines the x-ray and clears the patient for surgery. As an aside, the radiologist notes an unusual density in the lung and comments in the report that further studies should be performed. He does not call the surgeon. The report is then routinely filed. The surgeon does not read the report. Instead, he glances at the x-ray just before the surgery and then performs the operation. All goes well and the patient goes home. Nine months later, the patient returns to the hospital and complains to his family practice doctor about a cough that will not go away. The doctor orders a chest x-ray, and the mass is again seen. This time the doctor reads the report, discusses the finding with the radiologists and begins the process to make a diagnosis. Surgery is performed and, as fate would have it, the mass is cancer and is in an advanced stage. The patient and his family are initially distressed at the diagnosis but become outraged when they learn the cancer was detected on the first x-ray. They then file a claim under the Federal Tort Claims Act.¹

The claim is on your desk. Obviously, the standard of care was breached. The question now becomes whether the patient suffered any damage from the delay in diagnosis and, if so, whether the state law where the error was committed permits recovery for that damage.² Therein lies the problem as states are changing the traditional rules of causation and permitting recovery for delays in diagnosis or treatment. This is being done in one of two ways: a relaxation of the traditional concept of proximate cause or the recognition of a new tort known as "loss of chance."

A loss of chance occurs when the tortfeasor's negligence has caused the victim to lose a certain statistical, measurable chance of obtaining a certain outcome. Typically, the loss of chance problem presents itself as medical malpractice. The patient usually has some form of disease, e.g., cancer or coronary artery occlusion, already underway before seeing a physician. The physician then does not timely detect, or misdiagnoses, or erroneously treats. As a result, the patient alleges that the odds of surviving the cancer or the heart attack or the operation were reduced by the delay or error and asks for damages to compensate for the loss.

This article will discuss the loss of chance doctrine in order to help the claims officer recognize it and deal with it. This is not an exhaustive survey of all the loss of chance cases and medical conditions,³ nor is it an intellectual plea for adoption of the concept by American jurisprudence.⁴ In the first place, the law is changing too

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1. 28 U.S.C. § 1346 (b), 2671-80.

2. By its terms, the Federal Tort Claims Act (FTCA) makes the United States liable as though it were a private person in the state where the act or omission occurred. 28 U.S.C. § 1346 (b), 2674.

3. Annotation, *Medical Malpractice: "Loss of Chance" Causality*, 54 American Law Reports (A.L.R.) 4th 163 (1989).

4. See, e.g., Andel, *Medical Malpractice: The Right to Recover for the Loss of a Chance of Survival*, 12 PEPPERDINE L. REV. 973 (1983); King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Pre-existing Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981); Roubik, *Recovery for "Loss of Chance" in a Wrongful Death Action*, 59 WASH. L. REV. 981 (1984); Smith, *Increased Risk of Harm: A New Standard for Sufficiency of Evidence of Causation in Medical Malpractice Cases*, 65 B.U.L. REV. 275 (1985); Wolfstone & Wolfstone, *Recovery of Damages for the Loss of a Chance*, MED. TRIAL TECH. Q. 121 (1982).

quickly for any survey to be accurate. In the second place, the concept does not fit well into the role of defense lawyers.

We will first review the traditional concepts of proximate cause followed by a discussion of those cases that have relaxed the standard of proof. Next, the tort of loss of chance will be discussed. At the end, some suggestions will be provided on how to investigate and defend these types of claims.

II. CAUSATION: THE TRADITIONAL CONCEPT

As every first year law student learns, an essential element of the plaintiff's claim for negligence or any other tort is that the defendant's conduct caused the injury for which damages are sought. Causation comes in two forms: causation in fact and proximate causation.

Causation in fact is defined by the leading treatise on torts as follows: "The defendant's conduct is a cause of the event if the event would not have occurred but for the conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it."⁵ A different approach to cause in fact is to determine whether the alleged conduct was a substantial factor in bringing about the harm suffered.⁶ Proximate cause, although exceedingly more difficult to define, can be summarized as follows: A legal concept that "depend[s] essentially on whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred."⁷

A diminishing majority of states follow what is called the traditional approach to resolving loss of chance cases. Plaintiffs carry the burden of proof to establish cause in fact by a preponderance of the evidence. In a loss of chance case, the plaintiff must show that he had a greater than fifty percent chance for survival or successful outcome that was then lost or reduced to something less than fifty percent by the defendant. If there were less than a fifty percent chance at the moment, the standard of care was breached, and there is no recovery.

One of the clearest cases setting forth the traditional approach is *Cooper v. Sisters of Charity*.⁸ A sixteen-year-old boy was struck by a truck while riding his bicycle. Although he presented to the hospital with symptoms indicative of a head injury, no examination or tests were performed. Instead, the boy was released. The next morning he died of an intracranial hemorrhage. His mother then brought suit, alleging that the failure to diagnose and treat the bleeding caused his death.

At trial, one of the plaintiff's experts testified that "there certainly is a chance and I can't say exactly what—maybe someplace around fifty percent—that he would survive with surgery."⁹ The other expert for plaintiff said, "There is no possible way . . . for anyone [to say whether the plaintiff] would have survived or died."¹⁰

The Ohio Supreme Court then rendered an analysis of the proof that is required to prevail, or at least send the case to the jury for resolution. In a precise statement, the court held: "the issue of proximate cause can be submitted to a jury only if there is sufficient evidence showing that with proper diagnosis, treatment and surgery, the patient probably would have survived."¹¹ The court found that plaintiff's proof did

5. W. PROSSER & W. KEETON, LAW OF TORTS, sec. 41 (5th ed. 1984).

6. RESTATEMENT (SECOND) OF TORTS, § 433 (1966).

7. PROSSER & KEETON, *supra* note 5, at sec. 42.

8. *Cooper v. Sisters of Charity*, 272 N.E. 2d 97 (Ohio 1971).

9. *Id.* at 101, 104.

10. *Id.*

11. *Id.* at 104.

not rise to that level because no expert could furnish facts from which one "could infer that survival would have been more likely than not, if surgery had been performed."¹²

Cooper specifically rejects those cases that "derogate well-established and valuable proximate cause considerations" by permitting recovery for the loss of "any substantial possibility of survival" as distinct from a greater than fifty percent chance of survival.¹³ Thus, in the scenario described at the outset, plaintiff's possibility of recovery depends directly on what chance of favorable outcome was lost. If at the time of the initial x-ray, his chance of surviving the cancer was greater than fifty percent, but at the time of the discovery it was less than fifty percent, recovery is possible because the missed diagnosis, in probability, proximately caused the injury. However, if the cancer was at such a state that the chance of survival was less than fifty percent at the outset, no recovery may be had because from the beginning survival was less than probable. This sort of result, *i.e.*, a plaintiff being denied recovery notwithstanding a physician's negligence, led to courts modifying the strict rule by either relaxing the standard of proof or creating a right of recovery for the amount of chance lost.

III. THE REDUCED STANDARD OF PROOF

A. The "Substantial Possibility" Standard

The case of *Hicks v. United States*¹⁴ was the first medical malpractice case to put forth the notion of the substantial possibility standard. *Hicks* involved a failure to diagnose a strangulated bowel, which but for the delay could have been surgically treated thereby saving the patient's life. On appeal, the Fourth Circuit, applying Virginia law, found that the doctor's substandard care nullified whatever chance of recovery the decedent might otherwise have had and was, therefore, the proximate cause of death.

In a key paragraph, the court concluded:

When a defendant's negligent action or inaction has effectively terminated a person's chance of survival, it does not lie in the defendant's mouth to raise conjectures as to the measures of the chances that he has put beyond the possibility of realization. *If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable.* Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass. The law does not in the existing circumstance require the plaintiff to show to a *certainty* that the patient would have lived had she been hospitalized and operated on promptly. (Citing with approval *Harvey v. Silber*, 2 N.W. 2d 483 (Mich. 1942).¹⁵

This quote is a true example of the cliché we all learned in law school about a holding opening the flood gates of litigation. Notwithstanding the fact that it is *dicta*,¹⁶ this quote was the basis for several state and federal courts to relax the standard of proof as they surveyed how much of a chance was lost.¹⁷ As well as

12. *Id.*

13. *Id.* at 103.

14. 368 F.2d 626 (4th Cir. 1968).

15. *Id.* at 632, citing with approval *Harvey v. Silber*, 2 N.W. 2d 483 (Mich. 1942)(emphasis added).

16. See King, *supra* note 4, at 1368-69, n.4. Professor King notes that there has already been a sufficient basis on the record for finding that prompt care would have saved the patient's life. Such testimony easily meets the preponderance standard, and thus any discussion of a substantial possibility, a term that in context means more than slight but less than 51%, is surplusage.

17. See Annotation, *supra* note 3, at 187-94, for a synopsis of several cases.

adopting *Hicks*, several courts have expressly rejected the *Cooper* holding, noting that such a rule, i.e., the chance that was lost must have been greater than fifty percent, fails to deter negligence and subjects patients to less than adequate care unless they had better than a fifty percent chance of survival.¹⁸

The point that courts following *Hicks* stress is that in cancer or heart attack cases, a chance for survival has value. An expert can establish the chance of survival and measure the value of its loss. It is also easy to establish that with early detection and treatment, the odds improve. But the downside is the difficulty in determining the point at which we stop. Once it is held that a plaintiff can recover for a forty-nine percent chance that was lost, it is very easy to take the next step and hold that one may recover for the loss of any chance, "no matter how small that chance may have been," as was done in *James v. United States*.¹⁹ Under such rules, a physician can be held liable for any delay no matter how trivial.

B. Section 323 (A) – Restatement (Second) Of Torts

Another approach to the relaxed standard of proof is for the court to rely upon section 323(A) of the Restatement (Second) of Torts. Section 323(A) provides:

One who undertakes, gratuitously or for consideration, to render services to another as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if: (a) his failure to exercise such care increases the risk of such harm.²⁰

Under this rule, the physician providing care is liable for the harm caused to another if his care increased the risk of harm. Thus, if the doctor's negligence increased the risk of harm, the court may then decide whether the negligence was a substantial factor in causing the harm. This approach also relaxes the degree of certainty to which plaintiff's experts must testify in order to avoid a motion to dismiss or nonsuit at the close of their case. It also makes the physician liable for all the damages, regardless of the chance of survival at the outset or how much of a chance was lost.

The case of *Hamil v. Bashline*²¹ is representative. This was a case for wrongful death based on a failure to treat an ongoing heart attack. Plaintiff's expert said there was a seventy-five percent chance of survival if the treatment had been timely. Defendant's expert said death was a certainty regardless of the treatment. Citing section 323, the Supreme Court of Pennsylvania held that if a plaintiff introduces evidence that the risk of harm was increased, then it is for the jury to decide whether the risk caused the harm. The court read section 323(a) as "tacitly . . . permit[ting] the issue to go to the jury upon a less than normal threshold of proof."²²

In *Thompson v. Sun City Community Hospital, Inc.*,²³ the Arizona Supreme Court also followed the Restatement approach to the problem. *Thompson* involved the quality and timeliness of medical care given to a thirteen-year-old boy whose leg was severely injured in an accident. The issue at trial was whether the damage to the leg was

18. *Id.* But the problem with such analysis is that it presumes a physician can instantly assess a patient's chances upon presentation for treatment. This, of course, is not done as all patients are initially treated on the basis of their symptoms. It is only in the later stages that cost-benefit analysis balanced by medico-legal ethics are used.

19. *James v. United States*, 483 F. Supp. 581, 587 (N.D. Cal. 1980).

20. RESTATEMENT (SECOND) OF TORTS, § 323 (A) (1966).

21. 392 A. 2d 1280 (Pa. 1978).

22. *Id.* at 1287.

23. 688 P. 2d 605 (Ariz. 1983).

proximately caused by the delay in care. Expressing its dislike for the traditional causation rule (because it encouraged abuses of the expert witness' role and thwarted the deterrence aspect of tort litigation), the court adopted the Restatement rule. But the court placed some restrictions on the rule noting that it was for the trial court to use in permitting evidence of an increased risk of harm to be introduced. The court cautioned that the jury must still be instructed to find for the defendant unless it finds to a probability that the defendant caused the injury. The court further instructed that the Restatement rule applies only in those situations "where the duty breached was one imposed to prevent the type of harm which plaintiff ultimately sustained."²⁴

The early representative decisions of the relaxed standard of proof demonstrate how a plaintiff can recover for his underlying injury, or at least get to the jury, even where the chance of recovery was slight. The problem with this approach is that the plaintiff is given a windfall where the chances of survival are less than fifty percent. Moreover, it injects conjecture and speculation as the fact finder is allowed to determine whether this patient would have been one of those who have a favorable outcome, odds to the contrary notwithstanding. Verdicts become based on hope and dreams and "what might have been"²⁵ as opposed to the reality of the disease.

IV. THE TORT OF LOSS OF CHANCE

The loss of chance doctrine continued its natural path of evolution in the 1980s. Emerging out of the all-or-nothing approach based on the traditional causation requirements and the significant windfall under the substantial chance doctrine, the loss of chance doctrine has developed into a tort. In other words, whatever chance was lost can be compensated from a slightly different viewpoint.

Under this compensable injury approach, plaintiff's recovery is limited to the value of the loss of chance of survival. When calculating damages, the judge²⁶ first determines the dollar value of plaintiff's life, had that person survived or recovered. This value is based on such factors as age, health, work life expectancy and earning potential, all modified by the pre-existing disease. The percentage of chance that was lost by the defendant's conduct is then determined either by statistics or by dividing the life expectancy with the disease by the normal life expectancy. The total value of plaintiff's life, as determined earlier, is then multiplied by the percentage lost, to produce the net damage award. Plaintiff then recovers the amount of chance lost, measured in dollars as a percentage of the total.²⁷

The earliest case recognizing loss of chance as a cause of action is *Herskovitz v. Group Health Co-Op of Puget Sound*.²⁸ In this case the physician failed to diagnose plaintiff's lung cancer on his first visit to the hospital. This failure was found under the section 323(A) approach to reduce the chance for survival from thirty-nine percent to twenty-five percent. This fourteen percent reduction was held to be compensable, because to do otherwise would be a "blanket release from liability for

24. *Id.* at 613.

25. For all sad words of tongue or pen, the saddest are these: "It might have been!", John Green Leaf/Whittier, "Maud Miller", at. 53.

26. Under the FTCA, there is no right to a jury trial. 28 U.S.C. § 2402.

27. *E.g.*, if the plaintiff's life were worth \$1,000,000 at the time of the new diagnosis and the error caused the patient to lose a 15% chance at survival or to live five more years out of a 33-year normal life expectancy, the recovery would be \$150,000. This methodology was first suggested by Professor King, *supra* note 4, at 1382. Cases using this method include *Boody v. United States*, 706 F. Supp. 1458 (D. Kan. 1989); *Mays v. United States*, 608 F. Supp. 1476, 1482-83 (D. Co. 1985); *McKellips v. St. Francis Hospital*, 741 P. 2d 467, 476 and nn. 25-26 (Okla. 1987); *Deburkate v. Louvar*, 393 N.W. 2d 131, 137 (Iowa 1986).

28. 664 P. 2d. 474 (Wash. 1983).

doctors and hospitals anytime there was less than fifty percent chance of survival, regardless of how flagrant the negligence."²⁹ The court then moved on to damages, rejected the all-or-nothing rule, and held:

Causing reduction of the opportunity to recover "loss of chance" by one's negligence, however, does not necessitate a total recovery against the negligent party for all damages caused by the victim's death. Damages should be awarded to the injured party or his family based only on damages caused directly by premature death, such as lost earnings, and additional medical expenses, etc.³⁰

As was noted in a concurring opinion, care must be taken to define the injury. If the injury is the death, then established principles of causation require a verdict for the defendant. On the other hand, if the injury is the loss of chance of success, *i.e.*, survival, then proximate cause is satisfied.³¹ *Herskovitz* also generated serious dissent that commented on the inability to prove by a preponderance that one belonged in the fourteen percent.³²

In *Waffen v. United States*,³³ another lung cancer case, the Fourth Circuit expressed the issue as whether "plaintiff can prove by a *preponderance of the evidence* that a defendant's negligence actually deprived (plaintiff) of a substantial possibility of survival."³⁴

The court then balanced the proof needed. They felt that the *de minimis* approach of *James v. United States*,³⁵ ran afoul of the rule requiring some proof of injury. At the same time, they rejected the "but-for" rule of *Cooper v. Sisters of Charity*.³⁶ Instead, they noted that *Hicks v. United States*³⁷ required only a "substantial possibility" which in turn is a jury question. The court concluded:

The better rule we believe, is that once a plaintiff has introduced evidence that a defendant's negligent act or omission increased the risk of harm to a person in plaintiff's position, it becomes a question for the fact finder to determine whether the increased risk amounted to a loss of a substantial possibility of survival.³⁸

Reviewing the evidence presented at trial, the court found plaintiff had not met her burden in that she had failed to "produce evidence demonstrating to a reasonable probability, an actual injury, *i.e.*, a substantial loss."³⁹

This loss of chance as a tort approach is certainly more palatable than the relaxed standard of proof method of the Restatement or *Hicks*. It compensates those who have suffered a statistically demonstrable loss and can prove it to a reasonable degree of medical certainty. It does not impose an onerous burden on the defendants by requiring them to compensate plaintiffs for a percentage of the harm they did not cause or that would have occurred in any event. But it is still not palatable to a physician who is frustrated by the law's conversion of survival statistics gathered over decades and involving thousands of patients into a yardstick used to measure one specific life. Translating this into legal terms, suppose a lawyer was sued by his client because his recovery was smaller or his jail sentence was longer than his

29. *Id.* at 477.

30. *Id.* at 479.

31. *Id.* at 485.

32. *Id.* at 487-91.

33. 799 F. 2d 911 (4th Cir. 1986).

34. *Id.* at 922 (emphasis added).

35. *James*, 483 F. Supp. 581 (N.D. Cal. 1980).

36. *Cooper*, 272 N.E. 2d 97 (Ohio 1971).

37. *Hicks*, 368 F.2d 626 (4th Cir. 1968).

38. *Waffen*, 799 F. 2d at 923.

39. *Id.*

statistical chance predicted it would be. It is, nevertheless, a valid compromise and it does require plaintiffs to meet their burden of proof.⁴⁰

V. WHAT TO DO WHEN THE CLAIM COMES

The first thing to do is recognize that the case is a loss of chance claim. Generally, these claims involve failures to diagnose and treat cancer or heart disease. But, as seen in *Cooper*,⁴¹ *Hicks*,⁴² and *Thompson*,⁴³ delays in surgery that result in death or less than optimum outcome can also be the subject of a loss of chance claim. An important factor is whether there is a body of statistical evidence that can be used to measure the chance of survival at any point in time during the progression of the disease.

The next step is to develop the medical issues or the "so what" defense. Although harsh, it is, nevertheless, reality that cancer and heart disease are the top two killers in America. It is also a fact that medical science has not yet had a significant impact on overall mortality, and death rates are generally remaining constant. Indeed, as more women subject themselves to the stresses of jobs outside the home and to cigarette smoking, their mortality statistics from heart attacks and lung cancer are approaching those of men.⁴⁴ Finally, the diseases are clinically silent for a long period of time and are frequently detected only in an advanced stage that makes treatment difficult.

The claims officer should carefully examine the medical records and interview the claimant or his survivors to determine any particular risk factors that may be present. First, find out what was the particular family history. If there is a history of heart disease or cancer in the family, then perhaps the claimant is more genetically susceptible to disease. This inquiry is also an excellent double-check on whether the physician met the standard of care by eliciting this information. Then look at the records to see whether any risk factors that aggravate disease are present, e.g., smoking, excessive alcohol use, high blood pressure, diet, obesity, drug use, toxin exposure, or other diseases. Evaluate the degree of the patient's compliance with the doctor's recommendations. For example, did he only stop smoking in the ambulance on the way to the hospital? If there was an autopsy, its findings are very useful because they demonstrate the severity of the disease. If no autopsy was authorized by the family, the Air Force can argue that they removed any chance we had to fashion a defense.

Once the claims officer knows the patient's history and risk factors, the inquiry turns to learning about the disease itself. As noted earlier, the cases frequently turn on statistics. Heart disease and cancer lend themselves to statistical analysis because there is a specific event, i.e., the heart attack or the diagnosis, followed by death or survival for a period of time. Cancers can be analyzed further because there are multiple varieties, each with different treatment modalities and outcomes. Cancers are graded in degrees known as "stages." The stage signifies how advanced the disease is at the time of diagnosis and is based on such factors as the size of the tumor, the number of lymph nodes that are diseased, and the spread of the tumor to other organs. There are survival statistics for each stage, and this is how the court determines the amount of chance that was lost. Finally, the survival statistics vary according to the types and combinations of treatment given (surgery, chemotherapy, radiation) and the time the patient has survived (five, ten, twenty years). When considering the statistics, also be aware of the difference between disease free survival and overall survival. They are not the same.

40. 799 F.2d 911 (4th Cir. 1986).

41. 272 N.E. 2d 97 (Ohio 1971).

42. 368 F.2d 626 (4th Cir. 1968).

43. *Thompson*, 688 P.2d 605 (Ariz. 1983).

44. Dr. Steven A. DeVita, Personal Communication (May 1989).

A helpful technique is to create a matrix or grid that shows the survival statistics for each stage as of the date of the misdiagnosis and the diagnosis. This is particularly valuable when there is a controversy as to the stage on the date in question or when contrasting different treatments. It makes sure we are comparing "apples to apples."

Having established the chance that was lost, determine whether the applicable state's law recognizes the concept. A quick place to start is the American Law Reports 4th Annotation.⁴⁵ It has a complete collection of the cases recognizing or criticizing the concept, as well as a discussion of those jurisdictions where the rule is unsettled, including two jurisdictions of importance to the Air Force—Texas and California.⁴⁶ Be aware that the Department of Justice, and consequently Air Force Claims and Tort Litigation, takes a dim view of the loss of chance doctrine and resists any effort to extend it. Accordingly, the claims officer's investigation should explore all avenues of defense.

VI. CONCLUSION

Referring to the scenario at the beginning of the article, the answer is "it depends on the state." The author has litigated that scenario, or variations of it, five times. On two occasions, the case was won with a Motion for Summary Judgment because the states, Ohio and Florida, do not recognize the doctrine. A third was won at trial, again because the state, Texas, did not clearly recognize the doctrine and the judge applied traditional proximate cause rules. The fourth was tried in Arizona and involved a thirty-five-year old housewife whose breast cancer was not timely diagnosed. The Air Force lost \$250,000 based on *Thompson v. Sun City Community Hospital, Inc.*⁴⁷ The damages were not reduced to the percentage of chance lost. The fifth was tried in Kansas, involving a housewife whose lung cancer was not detected on an x-ray. The Air Force lost \$171,718.83. The judge found the total damages to be \$1,129,729.25 and reduced the damages by 15.2 percent—the amount of chance that was lost.

The law in this area has been developing rapidly. Although *Hicks v. United States*⁴⁸ was decided in 1968, the majority of cases developing the law were not decided until the 1980s. The loss of chance as a tort did not exist prior to 1983, with most of its development coming after 1985. Plaintiffs applaud the doctrine because it provides a remedy for the slightest harm. Defendants, of course, oppose it because the logical extension of the doctrine would find them liable for any injury or discomfort occasioned by any delay, no matter how slight. Moreover, doctors do not believe they should be liable for plaintiffs' poor health habits that aggravated or contributed to the disease. The problem is that these involve failed expectations and fatal outcomes—the greatest cause of malpractice claims in a public that gets its medical knowledge from the evening news or the morning newspaper. However, with an improved knowledge of the legal and medical issues, perhaps a better defense can be provided.

45. Annotation, *supra* note 3.

46. *Id.* at 195-201.

47. 688 P.2d 605 (Ariz. 1983).

48. *Hicks*, 368 F.2d 626 (4th Cir. 1968).

Alcohol-Related Claims Under the Federal Tort Claims Act

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I. INTRODUCTION

Changes in societal attitudes about alcohol abuse have brought about an evolution in the common law and increased passage of "dram shop"¹ legislation. As a result, claims and litigation often present novel theories of governmental liability under the Federal Tort Claims Act (FTCA).² This article is intended as a primer for claims officers investigating claims arising from the negligent or wrongful acts or omissions of federal employees when they involve the consumption of alcoholic beverages. It will discuss several theories of governmental liability premised upon common law, state statutes, or military regulations. This article may also be useful for those adjudicating claims under the Military Claims Act,³ because general principles of American tort law are applied.⁴

The two most common examples of alcohol-related claims are those stemming from drunken driving and assaults. Governmental liability may be alleged when a federal employee consumes an alcoholic beverage and commits a negligent or wrongful act or omission. Alternatively, a federal employee may be negligent by allowing another to consume alcoholic beverages (dram shop liability), or by not taking appropriate action to stop the foreseeable consequences of an intoxicated individual, when there is a duty to do so.

II. OVERVIEW OF THE FTCA AND EXCEPTIONS

For the Government to be liable under the FTCA, there must be a finding of governmental negligence under the law of the jurisdiction where the act or omission occurred.⁵ Therefore, before the United States can be held liable for an act or omission of its employees, there must be a duty recognized under applicable state law that has been breached.⁶ The analysis of the elements of tort liability—duty, breach, causation, and damages—is extremely important in alcohol-related cases. Often the act or omission upon which liability is asserted is not that of the intoxicated wrongdoer who harmed the claimant.

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1. A dram shop is a drinking establishment where liquors are sold to be drunk on the premises. BLACK'S LAW DICTIONARY 444 (5th ed. 1979).

2. 28 U.S.C. §§ 2671-80. See also Air Force Reg. (AFR) 112-1, Claims and Tort Litigation, ch. 12 (31 October 1989).

3. 10 U.S.C. § 2733. See also AFR 112-1, ch. 7.

4. AFR 112-1, *id.* at para. 7-12.

5. 28 U.S.C. § 2674 states in pertinent part: "The United States shall be liable, respecting . . . tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ."

6. 28 U.S.C. § 1346 (b).

When investigating alcohol-related claims, the federal adjudicator must be familiar with the exceptions to coverage under the FTCA contained in 28 U.S.C. § 2680, including assault by one other than a law enforcement officer.⁷ There are also judicially-created exceptions to the FTCA, the best known of which is the Feres doctrine,⁸ which prevents a military member from suing the Government for injuries incurred incident to service. Finally, there are circumstances where the FTCA may not be applied because another federal statute provides an exclusive remedy, such as the Federal Employees' Compensation Act,⁹ which precludes suit for injuries to federal employees while they are on duty.

III. CLAIMS INVOLVING DRUNKEN DRIVERS

A. Evolution of the Common Law Duty of Care

Claims arising from drunk driving accidents are difficult to investigate and adjudicate because they are emotionally charged. Some years ago, counsel and the courts could easily dispose of claims involving employee drunken driving by asserting that the driver was intoxicated and, therefore, outside the scope of employment.¹⁰ This precluded the liability of an employer, including the United States.¹¹ Now, because of developments in state law, we must look further. For example, we must ask: who served the alcoholic beverage, who knew the driver was intoxicated, and who allowed the individual to drive?

Previously, at common law, those who sold or furnished alcoholic beverages were not liable for injuries to third persons resulting from the acts of intoxicated persons.¹² This rule was based upon the idea that the drinker of alcohol was responsible for his own actions.¹³ Courts reasoned it was the consumption, not the providing of the alcohol, that resulted in the drinker's intoxication.¹⁴ In addition, the law viewed the injury to a third person as an unforeseeable result of the drinker's intoxication.¹⁵

Now, however, the majority of states recognize a common law cause of action against a provider of alcoholic beverages when the intoxicated drinker harms a third person.¹⁶ Many jurisdictions acknowledge that those who are of able body are not necessarily of able mind, especially when intoxicated.¹⁷ Moreover, since drunk driving accidents have become so frequent, it is no longer unforeseeable that injury to a third person will occur.¹⁸

B. State Legislation

Many state legislatures have also spoken on the question of dram shop liability. They have either created dram shop liability by statute,¹⁹ or they have eliminated it by declaring that it is the act of consumption, not the act of providing, which is the

7. 28 U.S.C. § 2680 (h).

8. *Feres v. United States*, 340 U.S. 135, (1950).

9. 5 U.S.C. §§ 8101-93.

10. W. PROSSER & W. KEETON, *THE LAW OF TORTS* 503 (5th ed. 1984).

11. *See, e.g., Christian v. United States*, 184 F.2d 523 (6th Cir. 1950).

12. *See generally* 48A C.J.S. *Intoxicating Liquors* Sec. 428 (1981); Annot., 97 A.L.R. 3d 528 (1980).

13. *El Chico Corp. v. Poole*, 732 S.W.2d 306 at 309 (Tex. 1987).

14. *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987).

15. *Id.*

16. *Id.* at 310. *Supra* note 1 contains an excellent overview of the common law and state statutes.

17. *Id.*

18. *Id.*

19. *Id.*

proximate cause of an injury to a third person.²⁰ In statutes that have eliminated dram shop liability, there is usually an exception for those who sell liquor to minors.²¹

C. Preemption Doctrine

It is important for adjudicators to research thoroughly common law and state statutes when dram shop liability is asserted.²² The law often distinguishes between a social host and a liquor licensee,²³ but generally does not discuss a seller who is not a licensee. Based upon federal supremacy,²⁴ the United States is not a licensee in any state. Therefore, when faced with a state statute that regulates only licensees, one must determine whether the legislation is preemptive of all common law on the subject, or whether a nonlicensed seller would be subject to liability under the state's common law.²⁵

D. Liquor Licensees

In *Gallea v. United States*,²⁶ the Ninth Circuit Court of Appeals was presented with the issue of whether the United States was immune from tort liability under the FTCA because it was exempt from California's liquor licensing requirements. The *Gallea* court interpreted a 1978 California dram shop statute²⁷ that established a cause of action when a licensee served an obviously intoxicated minor patron. Although there was no dispute in the case that a United States Marine Corps military club served liquor to an underage military member whose intoxication was clearly apparent, the case was dismissed. The court concluded the United States was not a licensee, and thus, there was no liability under the statute.²⁸ Moreover, the Ninth Circuit also held the statute was preemptive, and state common law did not apply.²⁹ As a result of this case, in 1986, the California legislature amended the statute to allow causes of action against any person "authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave, who sells, furnishes, or gives or causes to be sold, furnished or given away any alcoholic beverage, to any minor."³⁰

On the other hand, the Pennsylvania legislature enacted a dram shop statute that made it unlawful:

For any licensee, . . . or any employee, servant or agent of such licensee . . . or any other person, to sell, furnish or give any liquor or malt or brewed beverages, or allow them to be sold, furnished or given, to any person visibly intoxicated, or to any insane person, or to any minor, or to habitual drunkards, or persons of known intemperate habits.³¹

The issue to be decided in a claim that arose in Pennsylvania was whether the Air Force was "any other person" within the meaning of the statute. While this phrase appeared to include social hosts, the Pennsylvania Supreme Court in *Manning v.*

20. See, e.g., MO. REV. STAT. § 537.053 (1985).

21. *Id.*

22. For a discussion of how common law may be applied to interpret a state statute, see *Swift v. United States*, 866 F.2d 507 (1st Cir. 1989).

23. See, e.g., *Klein v. Raysinger*, 470 A.2d 507 (Pa. 1983).

24. *In re Tarble*, 80 U.S. 397 (13 Wall.) (1872).

25. See, e.g., *Douglas v. Schwenk*, 479 A.2d 608 (Pa. Super. 1984).

26. 779 F.2d 1403 (9th Cir. 1986).

27. *Id.* at 1404.

28. *Id.* at 1406.

29. *Id.*

30. CAL. BUS. & PROF. § 25,602.1 (1986).

31. 47 P.S. 4-493 (1) (1951) (emphasis added).

*Andy*³² held a nonlicensee was not liable under this statute when furnishing intoxicants without remuneration. The court stated "any other person" was not a class of citizens at large. However, in a concurring opinion, Justice Pomeroy suggested that "any other person" was meant by the legislature to include other persons in the liquor trade.³³

We found no Pennsylvania case that decided whether military clubs owe a duty of care to those injured by an intoxicated patron. If the United States was considered a nonlicensee, outside the scope of coverage of the act, the next question to be resolved was whether common law should be applied. A review of Pennsylvania cases indicated its courts continued to rely upon common law for nonlicensees. For example, in *Congini v. Portersville Valve Company*,³⁴ the court held that a social host who served intoxicants to minors, in violation of the state's criminal code, could be civilly liable under common law principles. For these reasons, the Air Force elected to attempt a reasonable settlement of the Pennsylvania claim.

E. Negligent Entrustment of Vehicles

A number of states recognize a cause of action for the negligent entrustment of a vehicle to another.³⁵ Based upon common law and state statutes, the United States could be liable in tort if an employee knowingly allows another to drive a vehicle while intoxicated.

F. Violation of a Duty

The case of *Sheridan v. United States*³⁶ created an additional theory of liability upon which an injured party may base a claim. In *Sheridan*, a Navy corpsman at Bethesda Naval Hospital, Maryland, became intoxicated after duty hours. He was lying face down in a hospital building corridor when two fellow corpsmen saw him and decided to take him to the emergency room for medical treatment. However, when the intoxicated corpsman became belligerent and the other corpsmen noticed a rifle in a bag he was carrying, the helpful corpsmen fled and took no further action. The intoxicated corpsman later went to a hospital window and fired the rifle at passing cars, one of which contained the plaintiffs, who were injured.

The lower courts dismissed the case, ruling the intoxicated corpsman committed an assault and, therefore, the exception to federal liability for assault contained in 28 U.S.C. § 2680 was applicable.³⁷ However, the Supreme Court held this was not, based upon the plaintiffs' allegations, a case arising out of an assault, but rather a cause of action based upon the failure to perform a duty, the failure of which could foreseeably result in harm to another.³⁸ The case was remanded to the district court to determine whether, in fact, there was a duty under state law for the two helpful corpsmen to report the intoxicated corpsman's condition and possession of a weapon.³⁹

In a drunk driving scenario, the *Sheridan* theory of liability manifested itself in the New Mexico case of *Shaffer v. United States*.⁴⁰ There, several airmen were on extended

32. 310 A.2d 75 (Pa. 1973).

33. *Id.* at 76.

34. 470 A.2d 515 (1983).

35. See generally W. PROSSER & W. KEETON, *supra* note 10, at 523. See also *Camatsos v. Aetna Casualty & Surety Company*, 428 So. 2d 1320 (La. App. 3d Cir. 1983).

36. 487 U.S. ___, 108 S.Ct. 2449, 101 L.Ed.2d 352 (1988).

37. 101 L.Ed.2d at 359 (1988).

38. *Id.* at 362.

39. *Id.* at 364.

40. D.C.N.M. No. CIV. 88-0375 HB (1988), 10th Cir. No. 89-2239.

temporary duty in a location without military base support. They were assigned the joint use of government vehicles. During an off-duty gathering at an apartment complex where some of the airmen were housed, one of the airmen became intoxicated. While driving a government vehicle to his apartment, he negligently caused the death of another. He was convicted by court-martial of wrongfully taking the vehicle. The plaintiff in *Shaffer* argued that the intoxicated member was negligent, and that the other members were negligent in their entrustment to him of a government vehicle and in their supervision of the intoxicated member. The district court granted the Government's motion for summary judgment after concluding that, under New Mexico law, none of the airmen was within the scope of employment during the party.⁴¹

G. Violation of a Regulation

In *Doggett v. United States*,⁴² the Ninth Circuit Court of Appeals concluded that a United States Navy regulation⁴³ determined whether allegedly negligent Navy members were within the scope of their employment, and whether they owed a duty of care to a civilian injured by an intoxicated Navy member. After duty hours, at a military club, a Navy member, in the company of superior petty officers, drank more than ten glasses of beer and became intoxicated. While driving his personal vehicle to his home, he collided with another vehicle, severely injuring one of its passengers. The plaintiff's suit was premised on the theory that various Navy members and employees were negligent because they allowed the serviceman to drive off the installation in an intoxicated condition. The district court granted the Government's motion to dismiss for lack of jurisdiction, holding that under California law, the United States is immune from liability for providing beverages to a serviceman, and government employees had no duty to control the conduct of another.⁴⁴

On appeal, the Ninth Circuit began its analysis by considering whether the club bartender, the enlisted member's superior petty officers, or the base security guards were within the scope of their employment. It found both the bartender and security guards within the scope of employment as alleged, but stated that whether the drinking companions were within the scope of employment was a "more complicated question."⁴⁵ The court concluded that the Navy regulation,⁴⁶ which required that intoxicated persons be reported to security guards and not released without an escort, delegated the responsibility for enforcement of the regulation to security guards and those in a position of command or supervisory authority.⁴⁷ For this reason, the court concluded the drinking companions were within the scope of their employment at the time the Navy member became intoxicated.⁴⁸ The case was remanded to the lower court to determine whether the security guards or drinking companions breached a duty of care owed to the plaintiff.⁴⁹

41. The plaintiff requested that the court reconsider its opinion. Upon reconsideration, the district court declined to disturb its earlier ruling and stated its conclusion that all the military members were outside the scope of their employment was not contrary to the Supreme Court's holding in *Sheridan*. See sources cited *supra* note 35.

42. 875 F.2d 684 (9th Cir. 1989), a case involving the 1983 version of CAL. BUS. & PROF. 25,602.1. See 479 A.2d 608 (Pa. Super. 1984). For a different result, see *Corrigan v. United States*, 815 F.2d 9534 (4th Cir. 1987).

43. WPNSTASB Instruction 5510.1, ch. 7, 7-1-1. Text of regulation at 875 F.2d 688, n. 1.

44. 875 F.2d at 686.

45. *Id.* at 687.

46. See *supra* note 43.

47. 875 F.2d at 688.

48. *Id.*

49. 875 F.2d at 694. The *Doggett* court relied upon the rationale for governmental liability set out in *Sheridan*, 487 U.S. ___, 108 S.Ct. 2449, 101 L.Ed. 2d 352 (1988).

H. *Respondeat Superior*

The final theory of liability for drunk driving to be addressed in this article is that of *respondeat superior*. A Texas case, *Otis Engineering Corp. v. Clark*⁵⁰ illustrates this cause of action. In *Otis*, an employee who had a history of drinking on the job was sent home because "he was weaving and bobbing on his stool and about to fall into his machine."⁵¹ His supervisor escorted him to the parking lot and asked him whether he was all right and could make it home. After giving an affirmative response, the employee started driving home. He was involved in an accident that took his life and the lives of two other people in another car. The court applied the following rule:

[W]hen, because of an employee's incapacity, an employer exercises control over the employee, the employer has a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others. Such a duty may be analogized to cases in which a defendant can exercise some measure of reasonable control over a dangerous person when there is a recognizable great danger of harm to third persons . . . [T]he duty of the employer or one who can exercise charge over a dangerous person is not an absolute duty to insure safety, but requires reasonable care. (Citations omitted.)⁵²

However, the *Otis* case should be contrasted with *Pinkham v. Apple Computer, Inc.*⁵³ In that Texas case, a bicycle rider was killed when struck by an automobile driven by an intoxicated Apple employee after he left the employer's chili cook-off. The employee, who had been drinking over the course of the afternoon, said good-bye to his supervisor and shortly thereafter was involved in the accident. The supervisor testified he did not know the employee was intoxicated. Evidence adduced at trial indicated other employees were aware of the driver's intoxication.

The *Pinkham* court held that, unlike in *Otis*, there was no evidence Apple took any affirmative action to control its employees.⁵⁴ Therefore, since there was no exercise of control over the employee, the court never reached the question of whether Apple met its duty to take such actions as would a reasonably prudent employer to prevent an incapacitated employee from causing an unreasonable risk of harm to others.

Claims officers must apply *respondeat superior* principles when adjudicating claims involving military functions. Under state law, what is the duty of the United States to its employees? What is the duty of the Federal Government to the general public when the Government knows an employee is an alcoholic or a problem drinker? Based upon the requirements of Air Force Regulation 30-2, do supervisors have an affirmative duty to report problem drinkers and give them extraordinary supervision? These concerns must be resolved in a way that conforms with the prohibition against disclosure of information about alcohol treatment. This information is confidential and may not be disclosed to those without a need to know, or outside the Department of Defense.⁵⁵

A California case illustrates the tension created by the duty to protect others and the duty to preserve the privacy of individuals.⁵⁶ An airman was awarded the use of a vehicle from a local car dealership upon his selection as base airman of the month.

50. 668 S.W. 2d 307 (Tex. 1983).

51. *Id.* at 308.

52. *Id.* at 311.

53. 699 S.W. 2d 387 (Tex. App. 2 Dist. 1985).

54. *Id.* at 390.

55. 42 U.S.C. § 290dd-3.

56. *Gillespie v. Lutz*, E.D. Cal. No. CIV. S-87-1117 RAR (E.D. Cal.).

Although he had previously been cited for drunk driving, the airman was permitted to accept the use of the vehicle. He caused the death of another while intoxicated and driving the dealership's car.

The district court judge denied a United States motion for summary judgment; the motion asserted that the United States had no duty to check the driving record of the airman prior to reporting his name to the car dealership as airman of the month. The dealership argued that it reasonably assumed the airman of the month would not have a drunk driving conviction and that the base was negligent in its selection. In the alternative, the dealership propounded that the base was negligent in failing to check the airman's driving record and warn the dealer. The case was settled.

IV. CLAIMS INVOLVING ASSAULT

As *Sheridan*⁵⁷ illustrates, assault cases may involve acts or omissions by drunken federal employees or the violation of a duty or regulation that results in an assault. Based upon the assault exception to the FTCA,⁵⁸ an assault by a federal employee outside the scope of employment, or unrelated to a duty owed by the Government to third persons, will not support a cause of action for alleged negligence. Absent such a scenario, however, *Sheridan* now makes it difficult for the Government to get an affirmative decision on a motion for summary judgment before discovery. For this reason, claims officers must establish the following: (1) Were the allegedly negligent employees within the scope of their employment? (2) Was there any duty owed to the claimant? (3) If so, was it breached? and (4) Was the assault reasonably foreseeable?

V. CONCLUSION

Claims officers can no longer summarily dispose of claims involving alcohol-related offenses. Whether the federal employee was in the scope of employment is no longer the sole question to be addressed. Rather, the investigation must focus on any duty owed by any federal employee to the claimant, whether established at common law, by statute, or by military regulation. It must then be determined whether the duty was breached, and if so, whether the breach was the proximate cause of damages. All of this is necessary for the proper investigation and adjudication of claims under the FTCA.

57. 487 U.S. ___, 108 S.Ct. 2449, 101 L.Ed.2d 352 (1988).

58. 28 U.S.C. § 2680 (h).

A Claims Officer's Guide to Aviation Claims

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Claims arising from Air Force aviation operations may pose special problems for claims officers for two reasons. First, the process of evaluating the facts and adjudicating the claim usually requires specialized knowledge of technical aspects of aircraft or missile operations. Second, the law applicable to aviation tort claims against the Air Force is somewhat different from the tort law that claims officers encounter more frequently. Specialized bodies of law cover particular types of operations, and many claims are settled under the Military Claims Act (MCA)¹ rather than the Federal Tort Claims Act (FTCA).²

This article is intended to offer practical guidance for claims officers who are not familiar with all aspects of Air Force aviation operations. Because aviation tort law is highly specialized and relatively complex, a brief article cannot discuss in detail all potential issues. The most optimistic goal of an article like this is to assist claims officers in:

- (1) identifying potential sources of liability in Air Force aviation operations within the claims officer's area of responsibility;
- (2) identifying factual information, and its sources, available to claims officers and which may be needed to adjudicate aviation claims;
- (3) locating statutes and regulations that apply to aviation operations, including state law, federal statutes and regulations and Air Force regulations;
- (4) locating the most relevant and useful case law governing aviation torts, in particular the law that has arisen from military aviation operations.

The single most important source of expertise, advice, and assistance for the claims officer in handling aviation claims is the Aviation and Admiralty Section of the Claims and Tort Litigation Staff (HQ USAF/JACC).

I. GETTING THE FACTS

Aviation claims arise from a wide range of Air Force operations and activities. The claims officer may have no warning of the claim, and may not even know much about the activities that gave rise to it. Nevertheless, the claims office will be responsible for collecting the evidence and establishing the relevant facts for adjudicating the claim. In most cases, preparation in anticipation of potential liability will make reaction to the claim much easier.

For the purposes of this article, aviation claims are divided into four categories based on the event or activity that gave rise to them: major accidents, aircraft control, noncombat operational activities, and organizational liabilities. These categories are arbitrary and are used for the sake of discussion only; they do not correspond to divisions in the law or Air Force regulations.

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1. 10 U.S.C. § 2733. See Air Force Reg. (AFR) 112-1, ch. 7.

2. 28 U.S.C. §§ 2671-80. See AFR 112-1, ch. 12.

A. Major Air Force Aircraft and Missile Accidents

A major aircraft or missile accident is always a tragedy. Even if the crew escapes without injury and the crash causes no damage beyond damage to the aircraft, Air Force aircraft are expensive. A major accident that destroys an aircraft or missile can have great implications in this age of limited budgets. For the claims officer, the majority of Air Force accidents have no claims implications; if a military aircraft crashes without damaging private property or causing death or injury to any civilian, the potential for Air Force liability is minimal. The majority of aviation accidents fall into this category, a military aircraft crashes during a training mission on a military range.

If major Air Force aviation accidents are rare, accidents that result in litigation are rarer still. In the case of any claims that do arise, the Air Force will usually attempt to settle, unless there is some question of liability. If cases go into litigation because a settlement cannot be reached, usually the only major issue is damages. Consequent litigation is months, or even years, removed from the accident. Therefore, collection and preservation of evidence is essential.

From the claims officer's perspective, the occurrence of a major accident requires immediate reaction where there has been loss of civilian life or damages to civilian property. If a major accident occurs in the claims office's area of responsibility, a claims representative is assigned to the immediate response team to assist in handling claims.³ This may involve deployment to a remote location and may demand extraordinary efforts in assisting claimants and collecting evidence. It is important to remember that the claims office's participation has these two purposes: to assist the victims, *and* to begin the claims investigation necessary to settle claims and to defend the Air Force in any resulting litigation.

After a major accident involving Air Force aircraft or missiles, the Air Force conducts two investigations in addition to the claims investigation. All Air Force claims personnel should be aware of the purposes of and differences between these two investigations in order to understand what the claims office's role is and how the claims investigation fits into the picture.

The first investigation, both in time and priority, is the safety investigation conducted under Air Force Regulation (AFR) 127-4. The purpose of the safety regulation is to prevent future accidents.⁴ The safety program and AFR 127-4 cover more than aviation accidents; they apply to all Air Force mishaps. The safety program uses the term "mishap" to make clear the unique purpose and use of safety investigations. The safety investigation is conducted by a board that collects information, deliberates to determine causes of the mishap and recommends remedies to preclude recurrence. The board receives testimony and some documentary evidence in confidence; this material, as well as the board's deliberations, conclusions and recommendations, is restricted to limited uses within the Air Force and subject to a claim of privilege against release outside the Air Force.⁵ The limited-use portions of the safety investigation report are *not* available to judge advocates or claims personnel for use in claims adjudication and litigation. The releasable portion of the safety investigation report is collected in Part I of the Safety Report.

3. See Atch. 1 to AFR 112-1. This plan for major accident response is a starting point for claims officers to develop their own plans, not a comprehensive final product.

4. AFR 127-4, paras. 1-1 and 3-1.

5. AFR 127-4, paras. 1-8. The limited-use restriction and privilege apply not only to the formal documents of the board, but also to associated working papers and reports. Conversations between aircrew members are recorded automatically in some Air Force aircraft; these recordings are also subject to limited-use restrictions and a claim of privilege.

The second investigation is conducted under the provisions of AFR 110-14, usually by a single investigating officer. The AFR 110-14 report collects the evidence concerning the accident for all purposes other than mishap prevention, including claims and tort litigation. The investigating officer obtains the releasable portion of the Safety Report and then collects additional testimony and documents to assemble into the Accident Report. The investigator interviews witnesses under oath. The final report includes a factual summary of the accident but no conclusions, recommendations, or opinions of the investigator.⁶

The AFR 110-14 report should establish the facts and circumstances of the accident, so the claims officer will not have to conduct an investigation to discover what happened. But the AFR 110-14 investigation does not replace the claims investigation conducted under AFR 112-1. The AFR 110-14 investigation does not include information about the specific damages suffered by individual claimants or potential claimants. Although the AFR 110-14 report includes a statement of damages,⁷ it does not address the specific amounts of damage in detail. The claims investigation should begin immediately, focusing on the situation of individual victims who may or already have filed claims. The fruits of this investigation will be well documented claims files on each potential claimant containing reports of each contact with the claimant, descriptions of the damages suffered by the claimant and the condition of property before the accident, and summaries of Air Force efforts to repair or clean up the damage.

What should the claims office do when confronted with a major accident? The most important single duty of claims personnel after a major accident is communication. Higher headquarters at Numbered Air Force, Major Command, and Headquarters USAF will all need rapid and accurate information on damages and claims. Staff agencies other than the Staff Judge Advocates will also need reports on claims activities and information collected. And, of course, claimants and potential claimants need information and assistance in determining whether and how to file claims. The most important decisions to be made, initially, concern how these communications will be conducted. The personnel on the scene will be overwhelmed with demands for information unless they establish clear lines of communication and refer requests to other agencies. The claims officer should set up clear priorities for dissemination of information. If possible, the claims officer on the scene should report regularly and frequently to HQ USAF/JACC and the on-scene commander. Other agencies requesting information should get it from HQ USAF/JACC or the commander. It is just as important to make contact with potential claimants, perhaps through the establishment of a local claims office that is advertised publicly, and to be ready with quick response to their questions and needs. The public perception of the Air Force will be formed by the way its personnel deal with claimants, the public, and the media. For guidance on dealing with the public and the media, refer to AFR 190-1, Public Affairs Policies and Procedures, chapter 9, which concerns accidents and serious incidents.

The claims officer should have another role that may last far beyond the immediate period of investigation. Wreckage of Air Force aircraft is removed from the accident site and impounded for use during the two investigations. Once the AFR 110-14 investigation is finished, the investigator turns the wreckage over to the Staff Judge Advocate. It should be preserved on the base where it is stored until there is no pending or potential litigation resulting from the accident. The claims officer is the

6. AFR 110-14, Atch. 1, para. A1-14. This regulation has recently been revised extensively, and the Air Force is publishing additional guidance for investigators.

7. Tab P of the AFR 110-14 report. See AFR 110-14, Atch., 4.

logical person to monitor the status of preserved wreckage at the base. Wreckage disposal requires approval by HQ USAF/JACC.⁸

What can the claims office do to prepare for major accidents before they occur? The basic tool is the office claims kit that should be ready at a moment's notice.⁹ The claims office personnel should be ready to respond on short notice to any location within the area of their responsibility. Simple items like a working flashlight and camera can be vital; lack of them could lead to loss of potentially vital evidence. And claims personnel should be ready to deploy on short notice; this may require an absence of several days. If the office is not prepared, the initial response team may be scaling mountains or trampling through fields in clothing that is comfortable and functional in the office but not in the outdoors.

Finally, claims personnel should be aware that major accidents have produced major litigation, even though it is rare, and so there is a potential for litigation in every case. The Air Force case with the longest life has been the Saigon C-5A crash. In 1975, a C-5A carrying Vietnamese orphans crashed near Saigon in what was then South Vietnam. On board were orphans being evacuated for adoption in the United States and Europe as well as a few adult passengers, and of course the crew. Many of the orphans and other passengers were killed in the crash, and suits were filed against Lockheed Aircraft that brought the United States in as a third-party defendant. The case was in litigation for years; the Supreme Court ruled on an issue of compensation for civilian government employees in connection with this case.¹⁰ The last litigation finally ended in late 1989 when the final issue was resolved in the Claims Court. Along the way the case presented issues of jurisdiction, destruction of evidence, and the appropriate level of compensation for the orphans who were killed, among others.¹¹ Claims personnel should not take for granted that all cases will be settled quickly and easily.

B. Claims Arising from Aircraft Control

This section of the article does not refer to control of Air Force aircraft by pilots; rather it addresses air traffic control and weapons control activities of the Air Force. Each active Air Force base where aircraft operate has some kind of air traffic control; some Air Force bases have responsibility for their surrounding airspace. Weapons control refers to air defense and tactical operations control; weapons controllers communicate with military aircraft during intercepts but are not responsible for air traffic control of civilian aircraft.

Air Force air traffic and weapons control facilities are potential sources of claims

8. AFR 110-14, para. 10. Coordinate requests through Numbered Air Force. All requests for disposal of wreckage should be in writing, and they should include any information available about pending or potential litigation. In accidents involving fatalities or serious injuries, HQ USAF/JACC normally will not release the wreckage for disposal until two years after the accident.

9. See AFR 112-1, Atch. 1, sec. D. For major aircraft accidents, the claims representatives may need other items not listed here; flashlights and outdoor apparel mentioned in the text are simple examples. Because an aircraft accident could happen anywhere in the claims jurisdiction area, claims personnel should be prepared for travel anywhere in the area.

10. *Lockheed Aircraft v. United States*, 460 U.S. 190 (1983).

11. These issues are discussed in several reported opinions from this extensive litigation, all in the United States Court of Appeals for the District of Columbia Circuit: *Schneider v. Lockheed Aircraft Corporation*, 658 F.2d 835 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 994 (1982); *Friends for All Children v. Lockheed Aircraft Corporation*, 665 F.2d 1330 (D.C. Cir. 1981); 717 F.2d 602 (D.C. Cir. 1983); 725 F.2d 1392 (D.C. Cir. 1984); 746 F.2d 816 (D.C. Cir. 1984). The history of the case is discussed extensively in the cited opinions.

liability. Air traffic control facilities that are responsible for airspace frequently communicate with civilian aircraft; when accidents occur the victims may assert claims based on alleged negligence of Air Force personnel. Claims arising from a weapons control context are far less likely, but one major Air Force case within the last few years addressed the responsibility of air defense control facilities directly.¹² More recently, the United States Navy has faced potential liability for firing on a civilian airliner in the Persian Gulf.¹³

The duties and problems of the claims officer in responding to an accident where Air Force air traffic or weapons control facilities may be involved are substantially different from the aircraft accidents discussed in the previous section of this article. Unless an Air Force aircraft or missile is involved, the Air Force does not conduct any investigation of controller incidents.¹⁴ The claims officer will not be notified of incidents that may create liability, such as the crash of a civilian aircraft in Air Force airspace, unless the claims officer has made contact with the control facility or learns of the incident from press reports. Since there is no Air Force investigation, if a claim is filed, the claims officer is left to his own devices to establish what happened. If the claim is not filed promptly, by the time the claims office begins an investigation, all the controllers who knew anything about the incident may have left the area, or even separated from the Air Force.

How does the claims officer go about collecting evidence and determining facts in this situation? There are some resources that should be available. The National Transportation Safety Board (NTSB) conducts investigations of civilian aircraft accidents, and prepares reports that are available to the claims officer, and to the public. There is a central repository of these reports in the Washington, D.C. area; all it takes to obtain one by telephone for official purposes is the aircraft tail number and the date of the accident.¹⁵ There are restrictions on the use of the report, but the factual portions can form the basis of the claims investigation.¹⁶ A second source of evidence is the Federal Aviation Administration (FAA), which prepares reports on

12. Korean Air Lines Flight 007 was shot down by the Soviet Union on 1 Sept. 1983. In the resulting litigation, plaintiffs claimed that Air Force weapons controllers in Alaska had a duty to warn the airliner of its impending danger. The district court dismissed the United States as a defendant, holding that there was no duty to warn to airliner, and that even if there were, the Soviet Union's action was the superseding cause of the harm, and thereby insulated the United States. *In re Korean Air Lines Disaster of September 1, 1983*, 646 F. Supp. 30 (D.D.C. 1986). Korean Air Lines remained as a defendant; after a trial in August 1989, the jury awarded one of the largest verdicts on record: \$50 million in punitive damages in addition to compensatory damages. For an analysis of the international implications of this incident, see Donahue, *Attacks on Foreign Civil Aircraft Trespassing in National Airspace*, 30 A.F.L. REV. 49, 60-61 (1989).

13. On 3 July 1988, the U.S.S. *Vincennes* shot down Iran Air Flight 655 over the Persian Gulf. The Department of Defense concluded that the downing of this airliner was not intentional but the result of a mistaken identification of it as hostile. *Formal Investigation into the Circumstances Surrounding the Downing of Iran Air Flight 655 on 3 July 1988*, approved by the Secretary of Defense on 19 Aug. 1988. There have been discussions concerning payment of compensation to the victims by the United States, see, e.g., Wash. Post, 9 July 1988 at 1, but at least one suit against the United States and defense contractors has been dismissed as nonjusticiable. *Nejad v. United States*, No. 1989 WL 136888 (C.D. Cal. 7 Nov. 1989).

14. See AFR 60-5, para. 3-7. AFR 60-5 concerns Air Force air traffic control operations. Paragraphs 3-6 through 3-13 set out the Air Force response to a mishap involving air traffic control. Note that the control facility is required to contact the claims officer, para. 3-7b (3), retain tape recordings, para. 3-9c, and cooperate with mishap and accident investigations, para. 3-10.

15. Delivery takes about two weeks. The telephone number, at the time of writing of this article, is (202) 382-6735.

16. 49 U.S.C. §§ 1903(c) and 1441(e). See also *McCandless v. Beech Aircraft Corp.*, 697 F.2d 1159 (D.C. Cir. 1983); *Kline v. Martin*, 345 F. Supp. 31 (E.D. Va. 1972). See generally Comment, *Admissibility of National Transportation Safety Board Reports in Civil Air Crash Litigation*, 53 J. AIR L. & COM. 469 (1987).

air traffic control accidents, and may have other information about an accident depending on where it occurred and how long after the accident a request is made.¹⁷ Typically the air traffic control facility works closely with the FAA, so the claims officer should request the assistance of the controllers in locating and obtaining relevant materials.

In conducting his investigation, the claims officer should establish a number of facts. It is important to collect all relevant evidence that otherwise may be lost. But to do that, the claims officer will need a basic understanding of the issues that the case is likely to present. In air traffic control cases, the issues are likely to be fairly standard: duty and breach. But there is a substantial body of law relating to the duties of air traffic controllers and what constitutes a breach.¹⁸ The FAA has adopted a manual for air traffic controllers that is used by Air Force controllers. Claims officers should be alert for local manuals, directives,¹⁹ and regulations that impose additional duties on controllers; these documents should be collected and preserved in the investigation or they may be lost.²⁰ Typical fact patterns may involve mid-air collision of civilian aircraft under control of Air Force air traffic controllers,²¹ or crash of a single civilian aircraft due to, for example, weather.²² Depending on the fact pattern, the claims investigation should focus on specific acts of controllers and the civilian pilot.

Defense of these cases, as with those in other categories, will benefit from a thorough investigation. No matter what the facts, the investigation should collect relevant documents, such as the local regulations discussed above. All potential witnesses — controllers on duty at the time — should be identified and their social security numbers obtained so they can be located later if needed.²³ The investigation should include copies of position logs showing who was on duty at various positions

17. This report, often called the "Air Traffic Package" can be obtained from the FAA. The package is prepared with an eye to litigation and is routinely released in litigation to all parties. Much of the information is also contained in the NTSB report; nevertheless, the Air Traffic Package should be available to the claims officer on request to the FAA. HQ USAF/JACC can obtain these reports if the claims officer runs into difficulty.

18. The cases in this area are far too numerous to cite comprehensively. As a starting point, claims officers should review *Shankle v. United States*, 769 F.2d 742 (5th Cir. 1986), and *Barbosa v. United States*, 811 F.2d 1444 (11th Cir. 1987) and *Rawl v. United States*, 778 F.2d 1009 (4th Cir. 1985). Cf. cases in which the United States was found not to be negligent: *Redhead v. United States*, 686 F.2d 178 (3d Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983); *Spaulding v. United States*, 455 F.2d 222 (9th Cir. 1972); *Mallen v. United States*, 506 F. Supp. 728 (D. Ga. 1979); *Associated Aviation Underwriters v. United States*, 462 F. Supp. 674 (N.D. Tex. 1978) with cases in which the United States was found liable: *Somlo v. United States* 274 F. Supp. 827 (N.D. Ill. 1967), *aff'd*, 416 F.2d 640 (7th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970) (both district and circuit court opinions are worth reading); *Stork v. United States*, 430 F.2d 1104 (9th Cir. 1970); *Rudelson v. United States*, 431 F. Supp. 1101 (C.D. Ca. 1977). There are extensive annotations concerning liability for air traffic control at 46 A.L.R. Fed. 24 and 47 A.L.R. Fed. 85 (1980).

19. The Air Traffic Control Manual, No. 7110.65, is revised periodically; the current edition should be available at the air traffic control facility.

20. Units often publish local regulations and supplements to higher headquarters regulations as well as operating instructions, standard operating procedures and letters addressing particular procedures. These local publications are not archived, and thus should be incorporated in the claims investigation to preserve them for litigation.

21. *Shankle v. United States*, 796 F.2d 742 (5th Cir. 1986). Cf., *United States v. Rawl*, 778 F.2d 1009 (4th Cir. 1985). In *Rawl*, the court found that contributory negligence of the pilot barred recovery.

22. *Barbosa v. United States*, 811 F.2d 1444 (11th Cir. 1987).

23. Identification of potential witnesses is a major function of the claims investigation, and can be particularly important in air traffic control cases. Many Air Force controllers are junior enlisted personnel who are frequently reassigned and who leave the Air Force for more lucrative positions once their enlistments are completed. Social security numbers are helpful in finding Air Force personnel through the Air Force locator, but once a witness leaves active duty it may be virtually impossible to find him. If possible, obtain additional information where it appears the witness may be reassigned or leaving active duty within the next few years, e.g., home of record, address and telephone number of parents or other relatives, and future plans for relocation.

and it should identify the equipment in use.²⁴ Tapes of radio communications with the accident aircraft should be preserved. The air traffic control facility is required to make a transcript of these communications, which should be included in the investigation.²⁵ Statements from witnesses are important as well.

In this area, preparation before the event is even more important than with major accidents. Claims officers should establish contact with their local control facilities to arrange for notification of incidents when they happen. Learning the airspace under Air Force control would also be beneficial in evaluating potential liability.

Cases involving the relationship between civilian aircraft and Air Force controllers may present issues of great novelty and tremendous significance. The potential for disruption of Air Force operations is higher in this category of cases than any other. Two recent cases illustrate this point. In *Shankle v. United States*, the United States was held liable for the collision of two civilian aircraft in Air Force airspace at Randolph (AFB), Texas.²⁶ The two aircraft were flying in formation so that a photographer on one could take a picture of the other aircraft with the famous "Taj Mahal" in the background.²⁷ During a turn the aircraft collided and crashed on the grass infield at the base. The two pilots and the photographer were killed; a twelve-year-old passenger (the photographer's daughter) walked away from the accident. In the resulting litigation, the district court held that the Air Force air traffic controllers were not negligent, but that an Air Force colonel who happened to learn of the flight and assist its communications was negligent in not taking action to ensure its safety.²⁸ Had this decision stood, the Air Force faced immense potential liability for any aviation accident in its airspace. Fortunately, the Court of Appeals held that the Colonel's fortuitous knowledge did not create a duty and that the pilots were responsible for their own aircraft.²⁹

The second case is more famous: the Soviet Union's shooting down of Korean Air Lines flight 007, on 1 September 1983. In this litigation, the plaintiffs have claimed that Air Force personnel knew that the Korean airliner was off course and would be endangered by entering Soviet airspace.³⁰ The Alaskan Air Command Air Defense Control Center (called ROCC)³¹ at Elmendorf AFB, Alaska, was one of primary foci

24. Position logs are not retained indefinitely, so they should be copied as soon as possible. Have the controllers provide samples of the initials they use on the logs to ensure the controllers on duty can be properly identified. Equipment, including the radar scopes and other systems, is changed from time to time, so a list of the units in use, by type and serial number, may be helpful. Photographs of the facility showing placement of equipment are encouraged, but do not stage photographs of Air Force personnel.

25. Air traffic control facilities routinely record all radio and land line transmissions and conversations on the circuits linking various positions in the facility. The air traffic control officer may impound these tapes after an incident, if the facility learns of it. He can make a transcript of the tapes, which may be hard to understand, and the facility should retain custody of the original tapes until all litigation or potential litigation has concluded. The original tapes can be copied (generally three will be needed: one for the Government, one for plaintiffs, and one for the court) and made available to the parties for review. See AFR 60-5, paras. 3-7 and 3-9 through 3-12.

26. *Shankle*, 796 F.2d 742 (5th Cir. 1986).

27. The court identified the "Taj Mahal" as an "Air Force building historically associated with the Stearman," *Shankle*, 796 F.2d at 743; the aircraft to be photographed was a Stearman trainer used at Randolph before World War II.

28. The Colonel had taken a ride in the Stearman before the photographic flight and he learned about it then; he called the base to assist in obtaining clearance for the civilian aircraft to enter Randolph AFB airspace.

29. 796 F.2d at 747.

30. See *In re Korean Air Line Disaster of 1 September 1983*, 646 F. Supp. 30 (D.C.C. 1986).

31. Responsibility for air defense of Alaska is assigned to 11th Air Force, Pacific Air Forces; Alaska is a region of the North American Air Defense Command (NORAD), a joint command of the United States and Canada. See AFR 23-28. The command center for the Alaska NORAD Region is the Region Operation Control Center (ROCC) located at Elmendorf AFB. Controllers at the center, who are not air traffic controllers, monitor radar information from radar sites along the Alaskan coast and control flights of Air Force interceptors that are dispatched to intercept unidentified incoming

of the litigation. Depositions of two officers on duty were taken, and one was shown on videotape to the jury at trial.³² The plaintiffs contended that the Air Force had a duty to warn the airliner; imposition of such a duty on air defense control facilities could have made performance of their primary function extremely difficult. The district court dismissed the United States as a defendant, finding no duty to warn.³³

Preservation of evidence is a paramount duty of Air Force claims officers. Even innocent loss of evidence can lead to problems in litigation, as it did in the Korean Airlines case. The ROCC is equipped to record radar data for future reference. When the Korean airliner disappeared, it became apparent within a few days that any course deviation sufficient to lead the airliner into Soviet airspace probably began over Alaska within Air Force radar coverage. On the night the airliner was shot down, however, the ROCC at Elmendorf AFB was not fully operational and so did not have enough computer tape to preserve radar data for more than about thirty hours. Before it became apparent that the radar data showing the course of the airliner in Alaska would be important, the tape for that night had been reused, and, therefore, the data was lost. The plaintiffs have argued that the Air Force lost crucial evidence that would show knowledge, and, in popular publications, this argument has been extended to Air Force concealment of evidence.³⁴ An aggressive claims officer, with tremendous foresight, might have taken steps to preserve this data immediately.

The lesson for claims officers is to know the operational activities at their bases, and consider potential liabilities when they arise. Quick action to preserve the evidence and identify potential witnesses can be invaluable.

C. Noncombat Operational Activities

Routine Air Force operations can cause damage in a variety of ways: sonic booms, objects dropped from aircraft, noise that frightens animals, and other less common causes. In many cases, the claims officer may not learn of the alleged damage until a claim is filed, and so investigation to collect the facts may be difficult.

How does the claims officer conduct an investigation of a claim alleging damage from Air Force operations? The factual investigation required will be different depending on the type of damage and the alleged cause. Each investigation has two primary facets: investigation of Air Force operations that could have caused the damage, and inspection and analysis of the damage alleged to see whether it corresponds to the type of damage that could be caused by Air Force operations.

How can a claims officer discover whether Air Force aircraft could have caused the alleged damage? The sources of information depend on the facts alleged, so the starting point for investigation is the information reported by the claimant. If the claim is that damage was caused by an object dropped from an aircraft, it should be fairly simple to determine whether it came from an Air Force aircraft. In many cases, loss of an object from an aircraft will be reported when it happens, and so the claims officer will be able to respond to the scene before claims are filed. Absent physical evidence of this type, the claims investigation must start with the information

aircraft.

32. The officers who were deposed were the two senior officers on duty the night the Korean airliner left Anchorage. Both were captains. They testified that there was no unusual activity that night. The deposition that was shown to the jury related to the question of the course of the airliner over Alaska.

33. *In re Korean Air Lines Disaster of 1 September 1983*, 646 F. Supp. 30 (D.C.C. 1986).

34. See Wash. Post, Mar. 5, 1988, at 1. This report was expanded in R. JOHNSON, SHOOTDOWN: FLIGHT 007 AND THE AMERICAN CONNECTION 289 (1986).

reported by the claimant. What sort of observations did the claimant report?

Many claimants report what they call "sonic booms" that they allege caused damage to their property. Claims investigators should be wary of the term "sonic boom" unless they understand what a sonic boom is and when it occurs. Sonic booms are created during supersonic flight of jet aircraft; almost all sonic booms in the United States are generated by high-performance military aircraft.³⁵ They sound like a thunder clap; that is, a brief, sharp bang. Military regulations require pilots to report sonic booms they generate and these reports are catalogued in the "boom bin" familiar to most claims investigators.³⁶

In most cases, the supersonic flight takes place at a relatively high altitude so the aircraft is not visible to observers, such as claimants, on the ground.³⁷ If the claimant saw an aircraft fly over at a low altitude, it is highly unlikely that the aircraft was flying at supersonic speed. Instead, any damage on the ground would be caused by vibration from the passage of the aircraft, not a sonic boom caused by supersonic flight. Careful attention to claimants' descriptions of the incident aircraft may clarify whether the allegation is a sonic boom or an overflight. Some types of military aircraft are not capable of supersonic flight, including large transports, e.g., the C-130, large bombers, e.g. the B-52 and some smaller attack aircraft, e.g. the A-7 and A-10.

It is important to understand the limitations of the boom bin. First, it depends on accurate reports of pilots. Second, the boom bin reports only sonic booms generated by Air Force and Air National Guard aircraft. It does not report Navy sonic booms or low overflights of military aircraft. The primary implication of this for the claims investigator is that the absence of a boom bin report does not rule out Air Force aircraft, and the claims investigator should realize that the damages reported by the claimant may not be those expected from a sonic boom.

Claims investigators should understand the difference between sonic booms and low overflights in order to locate the information needed to evaluate claims. If the information reported by the claimant and the physical characteristics of the damage suggest a sonic boom rather than a low overflight, the claims investigator should query the boom bin.³⁸ If the boom bin report is negative, or if the reported information from the claimant suggests a low overflight, further investigation is required. Most military training missions at low altitude or supersonic speed are conducted on approved training routes or in military operating areas (MOA), airspace reserved for military use. Each route and MOA has a manager,³⁹ and units that use this airspace are required to check with the manager in advance to avoid conflicts. Maps showing the training routes and MOAs are available to claims officers through the Defense Mapping Agency;⁴⁰ local units may also be able to assist in identifying local procedures or sources of information. Although managers do keep records of use of their routes and MOAs, these records are not retained indefinitely, so prompt action to retain them may be required. FAA centers may have recorded radar data of the flight path

35. Only a few civilian aircraft are capable of supersonic flight, and the FAA has imposed substantial restrictions on their operation. See 14 C.F.R. sec. 91.55 (1989).

36. See AFR 55-34, para. 4, and AFR 112-1, para. 4-21.

37. See *Lorick v. United States*, 267 F. Supp. 96 at 100 (D.S.C. 1967) This is a most instructive case that will bear close study by claims officers.

38. See AFR 112-1, para. 4-21.

39. Training routes and areas are published in Flight Information Publications (FLIPs) that should be available through units or base operations at all active flying bases.

40. Aeronautical charts and publications are not part of the normal Air Force base legal office library. They can be ordered by flying organizations through established channels. Claims officers should seek assistance from local flying organizations.

of military aircraft.⁴¹ This data is also not retained permanently under normal circumstances, so prompt inquiries are essential.

If the claims investigator discovers that military aircraft were operating at the time and place reported by the claimant, the next step is to contact the aircrew to obtain their statements about the conduct of the mission. Obtain altitudes and airspeeds as well as any details the pilot or other crew members may remember. If much time has passed, the crew may not recollect a particular mission, if it was entirely routine, so the claims investigator may learn nothing more than the crew's usual and normal procedures.

Investigation of the operations that could have caused the damage may reveal that Air Force aircraft were operating at a time and place consistent with the claimant's report, or it may fail to confirm any military operations. Failure to confirm military operations does not dispose of the claim, because it is possible for training missions to be flown without being reported. There is another possibility as well: the investigation may show that Navy aircraft or aircraft belonging to a defense contractor were involved in the incident.⁴² This may make it possible to transfer the claim although contractor missions might be flown under contract provisions that require Air Force payment of claims. Nevertheless, this investigation is essential to obtain the facts necessary for adjudicating the claim.

The second part of the investigation is a collection of information from the claimant and other civilian witnesses. It is second in description here, but not second in time or importance. Careful collection of detailed information from the claimant and other witnesses is a prerequisite for determining whether Air Force aircraft caused the claimant's damage. The investigator should ensure that what the witnesses saw and heard is recorded in as much detail as possible. What kind of noise? How many aircraft were seen or heard? Did the witnesses *see* the aircraft? If so, what color, size and shape were they, and how fast and how high were they flying? The witnesses may be familiar with military aircraft and thus able to identify the aircraft, but if they cannot, the claims investigator should do so. Investigation of the type of aircraft observed should be correlated with information obtained from the boom bin or route or MOA managers to confirm the claimant's report. The claims investigator should become familiar with the type of military aircraft operating in the area of claims jurisdiction. Different aircraft with different missions have different characteristics and parameters of operation. Identification of the aircraft is a weak area in many claims investigations.

It is equally important to collect and record detailed information about the damages claimed. Evaluation of the physical evidence of damage is absolutely critical to adjudication of the claim, and evaluation of this damage demands detailed facts. The particular facts required obviously depend heavily on the type of damage claimed. For damaged structures, the physical appearance of the structure and witness's descriptions of how the damage occurred should be recorded. In many cases, the most important single piece of information needed to adjudicate the claim is the report of an Air Force civil engineer who inspected the damage claimed.⁴³ The civil engineer's report may be the only real defense available to the Air Force if the claim is denied and the claimant files suit. The claims investigator should ensure that the

41. Radar data is recorded automatically at FAA Regional Centers for some portions of the United States. It is not preserved indefinitely unless the Center is aware of an incident or the data is requested by another agency, such as the Air Force. If it appears that FAA radar data is needed in an Air Force claims investigation, consult the air traffic control facility to determine where such data might be located.

42. Claims resulting from activities of other services should be transferred when it becomes clear that the other service caused the damage. See AFR 112-1, para. 4-11.

43. See AFR 112-1, para. 4-20d.

engineer's reports are complete and accurate and that the engineer will be prepared to back up his conclusions with strong testimony if the case goes into litigation. Make sure that the report states clearly the engineer's own observations in detail, and document the significant facts with photographs and written statements of potential witnesses.

During investigation of sonic boom claims (carefully distinguished from overflight claims), collect information in the categories that fit Air Force experience with sonic boom damages: confirmation (or lack thereof) of a supersonic flight and detailed description of the damages. There is a well established profile of physical consequences of the type of supersonic overflight that causes a sonic boom. The claims investigation should focus on the type of damage, looking for fragile-item damage consistent with sonic booms as opposed to structural damage not consistent with the known effects of sonic booms.⁴⁴

Animal claims pose a particular problem. In Air Force practice, animal claims arise solely from aviation operations. There is a surprisingly large body of case law concerning animal claims.⁴⁵ They remain difficult for two reasons: claims investigators may find it hard to collect satisfactory evidence of causation of damage, and amounts of damage may be difficult to establish. The law on damages to animals is usually not difficult; it is the facts that cause the problem. Air Force experience with such claims is extensive and there are sources of aid for claims officers who need it.

First, as to the problems of causation, recall that animals, unlike structures, do not remain unchanged waiting for a claims inspection. There may be no physical evidence of damage at all. Minks and foxes kept in pens for commercial breeding may be so alarmed by the low overflight of aircraft that they kill and eat their young, leaving no evidence.⁴⁶ Disruption of breeding during a particular time of year may cause losses in the form of fewer births, but again without leaving physical evidence. Larger animals, such as horses or cattle, can be frightened by aircraft overflights or sonic booms, but there is nothing inherent in observable injuries to these animals to confirm their cause by aircraft overflight.⁴⁷

How can a claims officer successfully investigate animal claims given these difficulties? The keys to success are quickness and persistence. Most large claims come from established breeding farms whose owners are familiar with Air Force flight operations and have made contact with Air Force operations personnel to discuss the effect of overflights on their animals. Local charts may show the locations of animal breeding farms and contain restrictions on overflight, or warnings concerning overflight may be published for aircrews, especially during sensitive breeding seasons.⁴⁸ Owners familiar with Air Force operations soon learn to call immediately after overflights to complain, and the claims investigation should begin promptly on receipt of notice of a potential claim. Public Affairs offices receive

44. General guidance for sonic boom claims is found at AFR 112-1, paras. 20 and 21. The Air Force published a pamphlet with a good general summary of sonic boom causes and effects, but it is no longer available because it is out of print. Claims personnel with long experience may still have copies; if one can be found it will provide a good introduction to this area.

45. See, e.g., *Wildwood Mink Ranch v. United States*, 218 F. Supp. 67 (D. Minn. 1963) (mink); *Brunt v. Chicago Mill and Lumber Company*, 139 S.2d 380 (1962) (cattle); *Weisberg v. United States*, 193 F. Supp. 815 (D. Md. 1961) (chickens); *Dahlstrom v. United States*, 228 F.2d 819 (8th Cir. 1956) (horses); *Leisy v. United States*, 102 F. Supp. 789 (D. Minn. 1952) (mink); *Maitland v. Twin City Aviation*, 254 Wis. 541, 37 N.W.2d 74 (1949) (mink). Probably the best single case for claims officers to review is *Peterson v. United States*, 673 F.2d 237 (8th Cir. 1982).

46. *Maitland*, 245 Wic. 541, 37 N.W. 2d 74 at 75.

47. Proof of damages can be made by commercial records in these cases.

48. One key element of the claims investigation is to check for these local restrictions in unit or base manuals and directives or published warnings such as NOTAMs or restricted flying areas on local charts. If there are any such restrictions, make sure they are documented in the claims investigation.

these complaints, so the claims officer should ensure Public Affairs refers potential claims as quickly as possible.⁴⁹ Prompt investigation has a much better chance of identifying and locating the aircrew involved so that Air Force operations can be confirmed and the details of the particular mission can be recorded. Immediate inspection of the claimed damage may reveal other potential causes of loss, *e.g.*, poor nutrition or improper hygiene, and can lead to identification of key witnesses. On the other hand, animal claims also come from owners who do not have commercial breeding operations but who simply claim loss of an animal. The claim may not be promptly filed and it may not even be possible to determine whether aircraft of any type were in the area at the time. In this situation, the claim has to be evaluated almost entirely on the internal consistency of the claimant's claims and evidence and the reasonableness of the claim.

In the area of animal claims, perhaps more than any other, claims investigators must assess and rely on the statement of claimants. There may be very little other evidence bearing on the claim. Established commercial breeders who have learned from prior experience to back up their figures with records of production and long-standing practices used to raise animals in the past can overwhelm the claims investigator with figures that require careful analysis. At the other end of the spectrum, individual claimants' credibility may depend on the few facts they can muster; one rancher who claimed for the loss of a horse with the improbable name of Speckled Butt Mildred gained credibility by identifying the aircraft that startled her as an A-7 with markings from a particular base.⁵⁰ But the claims officer should be wary of inconsistencies and misrepresentations where the claimant may feel he can avoid detection. One person filed a claim for loss of foxes at a newly opened commercial breeding farm near Anchorage, Alaska.⁵¹ He claimed C-130s from Elmendorf AFB were disturbing the female foxes causing them to kill and eat their young kits. The flights alleged were verified but they were conducted at sufficient altitude to suggest they should not have disturbed the foxes. The claims officer told the claimant that his claim would be stronger if he could bring in a fox kit killed by its mother after an overflight, which he could obtain by removing the dead kit from the pen before the mother could eat it. Later in the month, after another flight near the fox farm, the claimant appeared at the claims office with a dead kit that he said had been killed by its mother. The kit was cold — as if it had come from the refrigerator. The claims officer directed the claimant to take the body of the kit to the state medical examiner for a determination of the cause of death. The claimant offered a bribe to the medical examiner for finding of a cause of death consistent with recent aircraft overflight. It is not surprising that the Air Force denied the claim; it is more surprising that the claimant filed suit and the case went to trial. The United States won a dismissal:

Credibility determinations are seldom as clear cut as the one in this example. Nevertheless, claims officers should deal directly with claimants and interview witnesses to make credibility determinations, which may be even more important if the claim goes into litigation. Moreover, assistance in technical matters is available, and the technical guidance may bear directly on the information provided by the claimant, as in the previous example. The Air Force has a veterinarian, located at Brooks AFB, Texas, who can evaluate claims and arrange for inspections by Army Reserve veterinarians to provide expert assessments of claimants' veterinary practices.

49. See AFR 190-1, para. 5-60.

50. This information comes from a claim settled by the author while on active duty.

51. See AFR 112-1, para. 4-31.

and the likely reaction of animals to aviation operations.⁵² But in the final analysis, the facts collected during the claims investigation and the assessments of the claimant's credibility will be decisive factors in determining whether the Air Force should pay for the damages claimed.

The claims investigation also addresses the amount of damages payable if the claim is approved. Animal claims present some of the most difficult damages issues; animals have market value, but it may be difficult to establish. With smaller animals raised for their pelts, such as foxes and minks, values at market depend on quality, breeding, and numbers raised to adulthood. Losses of young kits, therefore, are inherently speculative because quality and numbers raised may fluctuate for reasons unrelated to the cause of the loss. Some particularly exotic breeding operations, such as those specializing in rare birds, have a chaotic market where values fluctuate tremendously and the success of raising marketable animals depends on a wide range of unpredictable variables such as the weather. Larger farm animals, such as horses and cattle, have a relatively stable market value but the value of particular animals may depend on breeding pedigree, which can introduce a highly speculative element of opinion. The best course for the claims officer is to obtain as much information and evidence as possible from the claimant; require substantiation of estimated market values in the form of market reports or other reports of actual sales; and beware of pricing lists that may not reflect actual sales prices. Examine and copy records from prior years showing actual production, sales prices and costs (which are used to offset claimed profits). And use the available Air Force expertise, such as the Air Force veterinarian and HQ USAF/JACC, to ensure all the relevant facts and evidence have been collected.⁵³

Although they are rare, claims are occasionally filed for personal injury of the claimant allegedly resulting from overflights or sonic booms. Reported cases concern injuries caused by frightened animals⁵⁴ and heart attacks occasioned by aircraft overflight.⁵⁵ Although these cases do not necessarily fit a pattern familiar to the claims investigator, the investigator needs to collect evidence in exactly the same categories discussed earlier. Discover whether there is any evidence of Air Force operations at the time and place claimed, and collect all available evidence concerning the nature and circumstances of the claimed injuries. Because of the unusual nature of this type of claim, outside expert assistance may be required. Medical law consultants often have useful expertise on the nature of claimed injuries; more specialized knowledge may also be needed. In a pending case, for example, the Air Force obtained evaluations from Air Force physicists specializing in aircraft acoustics and ground effects of overflight, as well as an outside expert in dendrology (the study of trees).⁵⁶ The complaint alleges low overflight of Air Force aircraft dislodged a tree limb that fell on the plaintiff's head.

Claims officers are more likely to encounter operation claims than major accidents, control of aircraft claims, or organizational claims. The key to success in claims adjudication and tort litigation is a thorough investigation to collect all the relevant evidence. As noted, the two major categories of evidence that will be needed are

52. *Id.*

53. The claims officer may have to obtain much of the damage information directly from the claimant. In doing so, the claims officer has an opportunity to assess the amount the claimant would accept if offered. Particularly in animal cases, this kind of informal negotiation can prove invaluable in settling claims.

54. *Long v. United States*, 241 F. Supp. 286 (D.S.C. 1965).

55. This information is based on personal recollection of the author.

56. *Musick v. United States*, Civil Action No. 86-0073 (W.D.Va.).

confirmation of Air Force (or other military) operations as alleged by the claimant, and the nature and circumstances of the damage or injury.

D. Organizations

Two aviation-related organizations are potential sources of liability for the Air Force. Claims officers should be aware of the potential for claims and the need for assistance in conducting investigations. These two organizations are Aero Clubs and the Civil Air Patrol (CAP). They differ dramatically, but claims officers should be familiar with both.

Aero Clubs are individually organized Non-Appropriated Fund Instrumentalities (NAFIs) at many operational Air Force (and other service) bases. As NAFIs, they are governed by Air Force regulations, but each club has its own charter and locally developed operations manuals and procedures.⁵⁷ Membership is open to active duty personnel and civilians with a military connection. The purpose of the Clubs is to encourage private aviation and educate military personnel about aviation. The Clubs typically own small general aviation aircraft that are rented to members for recreational flying. The Clubs also make available flight instruction using Club aircraft; Club members can make separate contracts with individual students. Thus, the Club may or may not be responsible for the instruction.⁵⁸

The potential for liability arises when there is an accident involving Aero Club aircraft. The Club conducts an investigation that is available to the claims officer in the event of claims against the Club.⁵⁹ Claims against NAFIs are handled under AFR 112-1, chapter 16; the Air Force claims office accepts and processes NAFI claims, but the claims are paid from non-appropriated funds administered by the Manpower and Personnel Center. Two Air Force civilian attorneys handle NAFI matters and are available to provide assistance if needed.⁶⁰ The claims officer's role is to conduct the claims investigation. In doing this, the investigator will need to collect the basic facts that underlie the claim of liability, focusing on the Club's operation and the circumstances of the accident.

In beginning the investigation, the claims investigator can start with reports of other investigations. Although there is no official Air Force investigation as there would be of an accident involving an aircraft owned by the Air Force, there are several others. The NTSB investigates civilian aircraft accidents and compiles reports that are available to the claims investigator in the same way that reports of other types of accidents are available.⁶¹ In many cases, the FAA compiles a report on civilian aircraft accidents that should be readily available to the Air Force claims investigator.⁶² The civilian police or sheriff's department in the location where the accident occurred may also prepare a report concerning the circumstances of the accident. And, as noted above, the Club also appoints an investigator who prepares a report.

Once all of these reports of investigation are assembled, what remains for the claims officer to do? All of these investigations even taken together probably will

57. See AFR 215-12, which governs Aero Clubs throughout the Air Force, setting policy and basic requirements for operations, financial management, etc.

58. Adequacy of instruction is often a contested issue in Aero Club litigation; claims officers should determine whether the incident pilot was trained by a Club instructor or a private instructor.

59. Claims against Aero Clubs fall under AFR 112-1, ch. 16. The Aero Club investigation is conducted for safety purposes, but there are no restrictions on its use. AFR 215-12, para. 5-8.

60. Claims officers should consult HQ USAF/JACC on Aero Club questions before calling MPC.

61. See *supra* note 15.

62. See *supra* note 17.

not provide the information and evidence needed to adjudicate the claim. In order to know what to look for, the claims officer should understand the potential liability confronting the Club. There are two general theories of liability that may apply in Aero Club cases: first, the negligence of Club officials in a variety of ways, such as entrusting the aircraft to the pilot or not training the pilot correctly;⁶³ and, second, negligence of a Club member in causing the accident.⁶⁴ The NAFI may pay claims under either theory in that the NAFI covers damages caused by authorized users of Club aircraft if used in accordance with Club rules.⁶⁵ The claims investigation, unlike the others discussed previously, focuses on particular negligence claims; it may fill in blanks overlooked by or irrelevant to the other investigations.

In most cases, the NTSB, FAA and Aero Club investigations will have developed a fairly complete factual account of the circumstances of the accident: how it occurred, what radio transmissions were made, what condition the wreckage was found in, and so forth. These investigations are less likely to contain evidence and information about the manuals, regulations and procedures of the particular Aero Club involved in the claim. Even if they are not directly relevant to the facts of the accident, Club directives and procedures on operational matters (e.g., clearance and briefing requirements, weather minimums and pilot qualifications for aircraft rental) are likely to be requested in discovery if the case goes into litigation. The claims investigation should preserve the relevant and even not-so-relevant materials, because they will probably be superseded and destroyed in the normal course of events before litigation commences, unless the claims investigation preserves them. Absence of Club directives and procedures can leave the door open to claims that may be difficult to defend in litigation. Another potential evidentiary problem is posed by the wreckage. Wreckage of Air Force aircraft is impounded and retained by the Air Force pending the conclusion of any litigation. Aero Club aircraft that crash in remote locations may be subject to looting; the claims officer's investigation should make every effort to preserve the evidentiary wreckage.

A second paramount purpose of the claims investigation in Aero Club cases is to locate potential witnesses who may have been overlooked in previous investigations—Club officers or employees, for example—and to preserve factual information in Club files.

The other organization whose activities may involve the Air Force claims officer is the CAP. Unlike Aero Clubs, the CAP is a national organization chartered as a civilian auxiliary of the Air Force with Headquarters, and an active duty Staff Judge Advocate, at Maxwell AFB, Alabama.⁶⁶ The CAP assists in search and rescue operations for missing and downed aircraft and has recently taken on an additional role in aiding efforts to interdict the importation of illegal drugs into the United States. Active duty personnel and civilians belong to the CAP; it has an extensive educational program in addition to its flying operations.

CAP aircraft accidents are rare, and the CAP has its own regulations on aircraft accident investigation.⁶⁷ The United States faces potential liability in some CAP accidents; some CAP operations are covered by insurance. The claims officer may

63. See *supra* note 58.

64. Claims officers should be aware in investigating and adjudicating Aero Club claims that a finding of negligence on the part of the Club member pilot may lead to a claim against the NAFI, see AFR 112-1, para. 16-6a(4).

65. *Id.*

66. See 36 U.S.C. §§ 201-08; AFR 112-1, para. 17-8. The CAP is a public corporation that operates under a charter based on this statute. Comparable organizations include the Red Cross and the Boy Scouts of America.

67. The relationship of the Air Force to the CAP is set out in AFRs 46-4 and 46-5.

be called upon to assist in CAP accident investigations within the claims office area of responsibility to locate witnesses or assist in wreckage control. CAP claims are covered by AFR 112-1, chapter 17.

II. ADJUDICATING THE CLAIM

After the facts are collected, the decision can then be made whether to try to settle the claim or simply deny it. For aviation claims, this decision can be more complex than it is for other tort claims, in that there are several statutes that may provide the authorization to settle the claim. In addition to thorough knowledge of the area of claims jurisdiction, full investigation to collect all the relevant facts, and intense preparation to be ready for aircraft accidents, the claims officer should have a clear understanding of the various claims statutes and their application to claims that may arise in aviation operations. These statutes are explained in AFR 112-1, and the discussion here will be relatively brief and focus on particular applications of these statutes.

The two primary statutes that apply to aviation claims are the Military Claims Act (and its counterpart, the National Guard Claims Act) and the Federal Tort Claims Act (FTCA).⁶⁸ The FTCA is undoubtedly more familiar to claims officers because they work with it in other types of tort claims, but aviation claims raise some limited issues relating to operation of aircraft. The fundamental determination to be made in adjudicating an aviation claim under the FTCA is whether some employee of the Air Force has been negligent. That determination can be a complex and technical one. In the first place, there may be more than one candidate for the post of negligent actor, and each may have special rules by which his conduct is judged. Air traffic controllers, for example, are required to follow FAA procedures; they use a precise vocabulary and have detailed instructions covering some, but not all, circumstances that can arise while they are controlling aircraft. There is an extensive body of case law interpreting their responsibilities,⁶⁹ and the FAA and Department of Justice have decades of experience in defending the United States in litigation based on alleged controller negligence.

One small example may show the level of technical expertise involved in air traffic control cases. Air traffic controllers are required to broadcast a warning to aircraft taking off or landing near large aircraft, such as Boeing 747s or DC-10s, because they generate strong air currents from their wingtips. These currents are called wake vortices. In giving one of these warnings, a controller said "Watch out for the prop wash" to the pilot of a small aircraft preparing to take off. The small aircraft was caught in the wake vortex. The Court found the United States liable because the controller did not use the proper terminology. This was not a military case, but the same issues apply to military air traffic controllers.⁷⁰

Negligence of pilots is another principle that has been the subject of a great deal of litigation. The courts have tended to expand the liability of controllers, and find pilots less responsible, over the years.⁷¹ Pilots are subject to Federal Aviation

68. See *supra* notes 1 and 2. For general information and an introduction to aviation claims against the Air Force, see Aly, *Claims Against the Air Force for Aviation Activities*, 3 THE AIR & SPACE LAWYER 1 (1987). There is a helpful and relatively comprehensive annotation at 5 A.L.R. Fed. 440 (1969).

69. See sources cited, *supra* note 18.

70. See *Hartz v. United States*, 387 F.2d 870 (5th Cir. 1968), *aff'd after remand*, 415 F.2d 259 (5th Cir. 1969).

71. For an unconventional analysis of these developments, see Dilk, *Aviation Tort Litigation Against the United States*, 52 J. AIR L. & COM. 797 (1987).

Regulations (FARs), but their responsibilities are not defined in such precise details as those of controllers. For Air Force pilots there are a number of regulations of particular importance, i.e., those involving minimum altitude requirements and the pilot's responsibility to see and avoid other aircraft.⁷² The Air Force also has regulations on flying operations, and, depending on the facts of the claim, there may be local operational procedures, manuals, regulations or supplements to Air Force regulations that are relevant to the claim.⁷³ It is extremely important to discover and preserve these documents for purposes of claims adjudication and investigation. Air Force regulations are preserved indefinitely at Headquarters, USAF, but regulations and similar documents issued by lower headquarters are not preserved in any archive. State laws also establish standards for operation of aircraft, including minimum altitudes.⁷⁴ Any of these sources of authority can be cited as the basis of liability for damages or injury on the ground if a court is so inclined.

There is another aspect to aviation claims under the FTCA. In a sonic boom case, the Supreme Court held that the United States cannot be held liable under the FTCA on a theory of strict liability.⁷⁵ The plaintiff must show some act of negligence on the part of the Government. In practical terms, this means that aircraft or missile operations, if planned and conducted in accordance with applicable FARs and Air Force regulations, do not form a basis for liability even if they cause damage or injury. In sonic boom cases in particular, if the Air Force can show that a particular mission was properly authorized and flown as planned, the court will dismiss the suit.⁷⁶

The Military Claims Act (MCA) differs from the FTCA in two significant ways. It authorizes payment of claims arising from noncombat activities without a showing of negligence, so it allows payment for the type of claims described above if the claimant can show that Air Force operations caused the damage. Secondly, the MCA does not provide a basis for litigation against the United States, so the decision on the administrative claim is final. The MCA is intended as an act of grace to allow the United States to compensate people for damages caused by necessary military activities. The term "non-combat activities" is a term of art, and it is discussed at some length in AFR 112-1,⁷⁷ so its meaning is fairly easy for the claims officer to discover. In the context of aviation claims, noncombat activities cover flight operations of Air Force aircraft and missiles. The simple test is whether the activity is uniquely military; civilians do not fly at low altitude to train for strike or reconnaissance missions, nor do they fly at supersonic speeds to intercept incoming aircraft. It may be arguable that some missions do not serve uniquely military purposes, and each must be evaluated on its own facts. Even missions that have civilian corollaries, such as airlift missions between major installations, may have uniquely military features that would qualify as noncombat activities. Some types of aviation claims simply do not qualify as

72. The most convenient source of Federal Aviation Regulations for the claims officer will probably be 14 C.F.R., pt. 91, subpart B (1989). See especially sec. 91.67 (a) (pilot's duty to see and avoid other aircraft) and sec. 91.79 (minimum altitude restrictions).

73. AFR 60-16 promulgates basic flying regulations; Atch 2 lists other regulations relating to flying operations. See especially paras. 5-2 (see and avoid) and 5-7b and Atch. 3 (speed restrictions).

74. The courts have used published regulations and state law as the basis for ruling on negligence in many cases; see, e.g., *Wildwood Mink Ranch*, 218 F. Supp. 67 (D. Minn. 1963); *Peterson v. United States*, 673 F.2d 237 (8th Cir.1982). For a detailed analysis of negligence in a major aircraft accident involving Air Force aircraft, see *United Air Lines v. Wiener*, 355 F.2d 379 (9th Cir. 1964) and its companion case, *United States v. Sommers*, 351 F.2d 354 (10th Cir. 1965).

75. *Laird v. Nelms*, 406 U.S. 797 (1972). For a more detailed analysis and fascinating background on this case see *Keenan, Nelms v. Laird: Absolute Liability Shattered by Sonic Boom*, 16 A.F.L. REV. 29 (1974).

76. *Maynard v. United States*, 430 F.2d 1264 (9th Cir. 1970).

77. See AFR 112-1, para. 7-17b.

noncombat activities. Aero Clubs and the CAP do not engage in noncombat activities, and air traffic control claims are not cognizable under the MCA.

The Air National Guard presents a special circumstance. The Air National Guard is an organization of the various states; however, most of its operations are conducted under federal orders. The Guard operates a wide variety of military aircraft and engages in many of the same activities as active duty forces. Negligent acts by Guard members are covered by the FTCA; the MCA does not cover Guard operations. The Guard, however, has its own noncombat activities statute: the National Guard Claims Act (NGCA), which authorizes the United States to pay claims arising from noncombat activities conducted under federal control.⁷⁸ Each claims investigation involving the Guard should contain the orders authorizing the particular mission to verify its federal control.

What does this divergence in the statutes mean for the claims officer? For the claimant it makes no difference which statute the Air Force applies to the claim; the significant decision is whether to settle the claim, and the claimant is not bound by the Air Force selection of an applicable statute if the claim is denied. The analysis the claims officer makes in adjudicating a claim, which on initial inspection could be construed under either statute (a sonic boom, for example), can be mystifying at first. The MCA explicitly gives precedence to the FTCA; if the damage was caused by a negligent act of an employee of the United States acting in the scope of employment, the claim *must* be adjudicated under the FTCA. Air Force policy is consistent with the statutory provision.

In most cases where a noncombat activity causes damage or injury, it is not possible to reach a firm conclusion that negligence occurred. In these cases where the statutes overlap but the claims officer cannot conclude with a high degree of confidence that a negligent act caused the damage or injury, the claim should be adjudicated under the MCA. This, in effect, gives the benefit of the doubt to the claimant. For example, consider the following hypothetical situation: A claimant alleges damage to his house, including broken windows and a cracked driveway, after the overflight at very low altitude of four Air Force fighter aircraft. If the claims officer determines that the crews were negligent for flying too low, the claim should be adjudicated under the FTCA and an offer of settlement made for damages caused by the overflight. If the claims officer concludes that the Air Force caused the damages but that the crews were not negligent, then the claim, if adjudicated under the FTCA, would be denied. If the claims officer cannot determine with a high degree of confidence whether the crew was negligent, as is most common and most likely, the claim should be adjudicated under the MCA. This precludes denial on the grounds that the claimant has not shown negligence and allows the Air Force to settle the claim on the basis of compensation as a matter of grace.

The other statutory compensation scheme that may apply in aviation cases is admiralty.⁷⁹ The law of admiralty has its roots in the Middle Ages and it is traditionally associated with maritime, *i.e.* shipping, activities.⁸⁰ Admiralty jurisdiction in the United States is vested exclusively in the federal courts, and the law of admiralty is essentially uniform across the nation, unlike the FTCA that depends on state law on some issues.⁸¹ Admiralty has a number of idiosyncratic rules and limits, particularly

78. 32 U.S.C. § 715; *see also* AFR 112-1, ch. 14.

79. Admiralty claims are covered by AFR 112-1, ch. 11. The Air Force has authority to settle admiralty claims. 10 U.S.C. §§ 9801-06. The United States can be sued in admiralty under the Suits in Admiralty Act, 46 U.S.C. §§ 741-52.

80. The Supreme Court addressed the development of admiralty law in *Offshore Logistics, Inc., v. Tallentire*, 477 U.S. 207, (1986), which addresses limitations on damages.

81. 28 U.S.C. § 1333.

relating to damages.⁸² It is relevant to aviation operations in that admiralty jurisdiction attaches to aircraft flights over water in traditional maritime activities.⁸³ Admiralty jurisdiction opens avenues of compensation to plaintiffs who might be excluded under the FTCA. Aside from the different rules in admiralty, for the claims officer the significant difference in admiralty is that there is no administrative claim requirement. Although the Air Force has authority to settle admiralty claims, the plaintiff may file suit without first filing an administrative claim.⁸⁴ When that happens, it complicates defense of the suit because there is no opportunity for a claims investigation prior to the litigation.

Deciding which statute applies to a claim and then determining whether the claim falls within the provisions of the statute is only half the battle in adjudicating aviation claims. The other decision the claims officer must make is whether the damage was caused by Air Force aviation operations. This is the point where the information and evidence collected during the claims and other investigations becomes most important. Close inspection of each element of claimed damages and comparison to the known effects of the aircraft operations alleged in the claim may reveal correspondences or, at the other extreme, impossibilities.

How should the claims officer approach the decision whether or not to pay an aviation claim? If the claims investigation is thorough and well documented, in most cases the claims officer will have a fairly sizable body of information, evidence and opinion to use in reaching this decision. Some cases are easy. The claim for cracks in a twenty-five-year old concrete driveway filed a week after a newspaper report of a sonic boom in the claimant's area is not convincing. On the other hand, a claim for broken windows after the same sonic boom may well be payable depending on the details, such as aircraft speed and altitude as well as the nature of the damage. It is, in the last analysis, a matter of judgment based on knowledge of the facts, application of the law and a full understanding of the context in which the judgment is exercised.

Underlying the claims officer's decision in even the smallest aviation claim is the threat of litigation. In order to defend a denial of an aviation claim, the United States has to be prepared to prevail over the plaintiff's allegations of negligence and causation. Even a claim adjudicated under the MCA may end up in litigation on the plaintiff's allegation of negligence. Therefore, the judgment on the claim should be made in light of the potential for eventual litigation. These considerations of litigation may color the decision on the claim. Which witnesses will be more credible? How well will the expert testimony of Air Force engineers stand up to cross examination? Careful reading of precedential cases from Air Force and other aviation litigation may help the claims officer with this judgment, and experience in litigation before courts-martial can be a valuable guide.

Contrast what the courts have said in two fairly representative cases about the facts in aviation litigation. Both are Air Force cases; the first one is a low overflight case and the second is a sonic boom case.

82. In aviation cases involving admiralty jurisdiction, probably the most significant limitation on damages is contained in the Death on the High Seas Act, 46 U.S.C. §§ 761-68, the wrongful death statute in admiralty. The statute limits damages to "pecuniary losses." 46 U.S.C. § 762. The Supreme Court has promulgated Supplemental Rules for Certain Admiralty and Maritime Claims, Rules A through F. Rule F contains liability limits.

83. The leading case on admiralty jurisdiction in aviation cases is *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

84. There is no requirement of an administrative claim in the Air Force Admiralty Claims Act, 10 U.S.C. §§ 9801-06, as there is in the FTCA, 28 U.S.C. § 2675.

In addition, the eyewitness testimony indicates that the B-52 was flying at an altitude of less than 550 feet when it flew over the Peterson's farm. The pilot of the aircraft testified about the day in question as follows: "I do not remember that specific flight." Transcript of Proceedings, at 15. And later he testified: "I remember the flight as such but all the specifics, no, sir, I do not." Transcript of Proceedings, at 51. The pilot testified that the height of the B-52 during the mission was established and maintained by use of a radar altimeter. The crew would set a "clearance plane setting" on the radar altimeter and any time the plane dropped below that setting a light would flash. If the plane remained above the level of the setting, the light would not flash. On the day in question, the radar altimeter did presumably function properly throughout the flight. The pilot testified that, although he could not remember the specifics of the flight, he did know that whenever the radar altimeter flashed, he would climb in the plane until the flashing stopped. When asked if at any point during the flight he fell below 550 feet, the pilot answered, "Not that I know of." Transcript of Proceedings, at 26.

The pilot, however, also testified that "[i]t's standard for [the radar altimeter] to flash" during a flight. Transcript of Proceedings at, 49. He said that it normally flashed during the mission because the crew was trying to fly right at 550 feet so they "tried to keep it right there where it just barely flashes." *Id.*, at 50. However, when the light is flashing, one cannot tell how far below 550 feet the plane is flying. In addition, Mr. Peterson testified that as the B-52 approached his farm it could have flown over a river valley about three and one-half miles away from the farm. As the plane climbed out of the valley, over the Peterson's farm, it could have been well below 550 feet. Thus, taken as a whole, the pilot's testimony that he did not fly below 550 feet is, at best, equivocal.

On the other hand, four eyewitnesses testified that the plane was flying well below 550 feet. Kenneth Peterson, his wife, and his son each testified that the plane was flying at approximately 75 feet. A fourth witness, a neighbor of the Petersons', testified that he saw the plane flying at about 300 to 400 feet. These witnesses, although they may have been mistaken about the exact height of the plane, do remember the specific day and time in question. And although the Petersons' credibility may be questioned to some extent because of their interest in the outcome, the neighbor's testimony serves as proof of the pilot's negligence, especially because the neighbor had seen B-52s flying the route before and he knew the level at which the planes should be flying.

The plaintiff has produced credible evidence that the plane flew below acceptable limits and established a prima facie case of liability. The Government's evidence failed in rebuttal. Thus, the trial court's ultimate finding of no negligence is not supported by the record and must be deemed clearly erroneous. Accordingly, we reverse and remand, directing that the district court find the Government negligent and determine plaintiff's damages.⁸⁵

This first case of a low overflight illustrates the difficulties of persuading the court with evidence from Air Force witnesses in the face of credible testimony from other witnesses. The second excerpt looks at the other side of the coin, the difficulties facing plaintiffs when confronted with strong expert testimony.

Just as modern archaeology has debunked the Biblical legend according to which Joshua's trumpet leveled Jerichó's walls, a collapse now deemed by less romantic engineers to have been purely the consequence of differential settlement from ancient tunnelling operations, so today in the era of supersonic flight it has been established beyond peradventure by elaborate engineering studies and field tests that the cracked cinderblock which plaintiffs allege as their principal damage is far beyond the test-proven capability of sonic booms and is clearly in this instance the product of poor construction and differential settlement. A painstaking study of the record leads me to believe, reluctantly, that plaintiffs embroidered the facts in their zeal to win. Desire tends to fuel the imagination.

... There had been no response to [prior] complaints by November 14, 1968, when at or about 2:24 p.m. an SR-71 (three of them, say plaintiffs) flew near their house at Mach 3 speed in a north-to-south direction and an altitude of about 2,000 feet (over 70,000 feet per official Air Force records), at a lateral distance from the house of about 37 miles (per plotting of defendant's expert), or 2 to 9 miles (per other evidence). We adopt the 9-mile distance, with some uncertainty, only because it accords with the pilot's affidavit, and in any event makes no

85. *Peterson*, 673 F. 2d 237,241 (8th Cir.1982).

difference in the result. A sonic boom in the wake of the flight deposited a cone-shaped overpressure carpet about 70 miles in width on the ground (if the 70,000-foot altitude is accepted, as it is) distributed evenly on either side of the center line of passage, which was the shock epicenter, with tapered diffusion to the lateral cutoff parameters of the corridor beyond which the shock became a distant rumble. The diffusion results largely from distortion and refraction due to varying travel distance through the atmosphere from flight path to ground.

... The plaintiffs, their son, selected relatives and friends, by testimony or affidavits represented that, prior to the sonic boom of November 14, 1968, the house had been in good condition. Significantly, others testified - from whatever motivation, even the truth - that the conditions described by plaintiffs as resulting from the sonic boom of November 14, 1968, had been in existence for many years, and were the result of shoddy construction in the late 1940's by a builder who had built other comparable concrete block houses in the same area which also developed settlement cracks soon after completion similar to those in plaintiffs' house. . . the clear preponderance in the quality of that evidence is that the damage complained of preexisted the sonic boom of November 14, 1968, by many years. Other evidence corroborates that conclusion, including inconsistencies in the plaintiffs' claims record and testimony, and the expert evidence on the nature and potential extent of sonic boom damage in general. Some conflicts deserve separate mention.

In their earliest claims and correspondence the plaintiffs described their damage only as "burst" concrete blocks, and referred to the aircraft causing the boom as having been "heard" by them. A few months later, the plaintiffs revised their claim by correspondence to include glass damage, but not until the Air Force report denying their claim initially had noted that plaintiffs did not claim glass damage. At trial the plaintiffs testified as to the broken windows, which they averred were reglazed by the son hours after the sonic boom. The co-plaintiff father and his son also testified that when they heard the sonic boom they ran out of the house and "saw" three aircraft disappearing rapidly to the south 300 to 600 feet over the treetops at about 2,000 foot altitude (Some trees!). Not only does their testimony of having *seen* the aircraft conflict with their prior statement of having only heard an airplane, but the three aircraft which they testified to have seen confutes the official record that only one supersonic flight took place anywhere near the plaintiffs' house on that date. Moreover, given the 2,000 mph speed of the SR-71, and its altitude of over 12 miles, it would have been inherently unlikely for the co-plaintiff and his son to have evacuated the house in time to have focused on and seen the swiftly disappearing SR-71, which in any event at 70,000 feet would have been detectable if at all only as a silver glint in the far-off sky.

Two other circumstances militate against belief in the plaintiffs' account of the facts. First, if the plaintiffs' house was damaged on November 14, 1968, by a sonic boom as they maintain, it is strange that there were no other complaints from the many thousands of other properties, including those of plaintiffs' neighbors, necessarily lying within the 70-mile terrestrial embrace of the SR-71's thunderous trail across North and South Carolina on the closing leg of its non-stop flight from point of origin in California. Second, when the Air Force team inspected plaintiffs' house on December 19, 1968, it was found that almost all of the concrete block and plaster cracks contained telltale signs of age, viz: vestiges of paint from painting long predating the sonic boom, or dirt, grime and old cobwebs in the cracks that were inconsistent with plaintiffs' protestations of fresh origin. The proof of causation no more supports sonic boom than it would poltergeist.

Any lingering doubt is set at rest by the testimony of Dr. John H. Wiggins, Jr., the defendants' expert witness, whose science-based views eliminated any possibility that the plaintiff's damage resulted from the sonic boom of November 14, 1968, and made it clear that poor construction settlement was the cause . . .

Since the advent of supersonic flights and resultant sonic booms the government has sponsored a series of test programs which have produced a body of empirical data concerning the nature of sonic booms and their measured physical consequences to structures. Those facts are presented in some detail in findings 12 and 13, leading to the conclusion in finding 14 that the damage to plaintiff's home of which they complain was not attributable to the sonic boom of November 14, 1968, or to sonic booms prior thereto, but instead long predated the sonic booms and was brought about by the more prosaic causes of poor construction and differential settlement. No useful purpose would be served by repeating here the facts in the cited findings, except to observe that under the worst imaginable atmospheric conditions an SR-71 flying at a 70,000-foot altitude and at a Mach 3 speed would produce an overpressure at ground level immediately below the flight path of 2 psf which is less overpressure than the minimum

required even to break window glass, and the further fact that, according to all of the scientific data, no level of sonic overpressure can damage or affect a concrete brick wall. . . .⁸⁶

The courts reached opposite conclusions in these two cases, but their analyses share a common factor: detailed examination of the facts and the credibility of the evidence and testimony. Thus defense by the Air Force under these circumstances depends almost totally on the thoroughness and quality of the claims investigation.

Adjudicating an aviation claim does not have to be a solitary process. Just as in the investigation stage, there are sources of assistance and counsel available to the claims officer on technical or more general issues. On the base, the claims officer may benefit from consulting the air traffic control facility, operational squadrons or even the flying safety office. Higher headquarters, including Headquarters USAF, can be a valuable source of assistance and guidance. Even civilian agencies such as the FAA are in a position to help.

III. IT'S NOT OVER TILL IT'S OVER

Adjudicating the claim is not necessarily the end of the claims office role in aviation cases. If the plaintiff files suit under the FTCA or the Suits in Admiralty Act, the claims office will undoubtedly become involved. Once suit is filed, primary responsibility for the case lies with the Department of Justice (DOJ). The DOJ Torts Branch in Washington, D.C. has a staff of specialists in aviation and admiralty cases, and they will review the complaint initially. Attorneys from the DOJ Torts Branch staff in Washington (called "Main Justice" for ease of reference) will handle major cases involving unusual or highly significant legal issues. Other cases are delegated to the United States Attorney's Office in the federal district where the complaint is filed.

The Air Force makes a similar decision. Normally the complaint is served on the Defense Department, but even if it is not, Main Justice notifies the Air Force and sends along a copy of the complaint. If the case is assigned to an attorney at Main Justice, it will probably be assigned to an attorney at HQ USAF/JACC as well. Even if the case is delegated to the United States Attorney's Office, it may be assigned to an Air Force attorney at HQ USAF/JACC for a variety of reasons; the case may require unusual expertise or several Air Force organizations at different bases may be involved, so that the defense attorney will need to coordinate activities in many different locations. The cases that are delegated to base offices for defense are primarily those that involve only local issues, such as a single overflight alleged to have caused localized damage.

If defense of the case is delegated to the base office, the claims officer will be designated as the Air Force attorney responsible for the case, and the United States Attorney, or more likely the Assistant United States Attorney (AUSA), assigned to the case will deal directly with the claims officer. The Air Force attorney's role is twofold: supporting defense of the litigation with the AUSA, which includes ensuring Air Force interests are fully protected and strongly litigated, and keeping higher headquarters (especially HQ USAF/JACC) fully informed of the status of and important developments in the case.⁸⁷ Over the last few years, the Air Force has

86. *Nelms v. United States*, No. 295-74, slip opinion at 3 (Ct. C1. Oct. 4, 1977). This case was filed by the plaintiff in *Laird*, 406 U.S. 797 (1972), in the Court of Claims after the loss in the Supreme Court. A number of cases have reached the same result based on similar, if perhaps less grandiloquent, analysis. See, e.g., *Lorck*, 267 F. Supp. 96 (D.S.C. 1967).

87. HQ USAF/JACC provides litigation support in litigation relating to tort claims; other litigation

participated actively in litigation of many aviation cases; attorneys assigned to defend these cases are encouraged to do as much of the defense as possible, including appearing in court, provided the AUSA agrees.

Even if the case is not delegated to the base, the claims officer may well have a large role in it. The base office, in many cases, still has control of the physical evidence relevant to the litigation, including wreckage, records of various types, and any other relevant equipment. The parties may want to view this evidence and the crash site or locations on the base that relate to the case, such as the air traffic control facility, for example. Base claims officers have been called on in the past to conduct all of these activities, as well as to help locate witnesses and arrange for travel to attend trial or depositions. Defending depositions is another part of litigation in which claims officers can play a crucial role. Depositions in aviation cases may cover a variety of issues, e.g., aircraft operation, maintenance, procurement, and many others. The skills involved for the attorney representing the United States should be familiar to claims officers experienced in litigation. The law, for the most part, is found in the Federal Rules of Evidence and Federal Rules of Civil Procedure.⁸⁸ Witnesses should be carefully prepared to testify, and the preparation should focus on the expected areas of inquiry and the important issues of interest to the United States. Any notice of deposition received at the base should be reported to HQ USAF/JACC. Attorneys at HQ USAF/JACC who specialize in aviation cases can provide assistance and guidance even when they do not cover the deposition.

Some of the most hotly contested aviation cases do not include the United States as a party. Because of the Feres doctrine,⁸⁹ active duty military personnel are barred from recovery from the United States for injuries occurring incident to their service. Although this doctrine has been challenged many times, its application has not been restricted in aviation cases. The Feres doctrine does not bar military personnel from recovery from manufacturers under negligence or product liability theories. There have been a number of suits involving military aviation accidents in which Air Force attorneys have defended depositions of Air Force witnesses, produced documents and wreckage in Air Force custody, and prevented release of privileged portions of safety investigations.⁹⁰

The Supreme Court recently issued an opinion in *Boyle v. United Technologies* which delineates a defense for government contractors.⁹¹ This decision followed a period of several years when the various United States Courts of Appeal adopted different, and to some extent conflicting, standards. The *Boyle* decision may lead to a decrease in contractor litigation. Nevertheless, claims officers should be prepared to defend Air Force interests in cases where the United States is not a party. One of

support functions at Headquarters, USAF are assigned to JACL, JACN, JACP, and JACE.

88. In particular, claims officers should be familiar with Federal Rules of Civil Procedure 26, 27, 29, 30 and 34.

89. The doctrine was established in *Feres v. United States*, 340 U.S. 135 (1950). In a recent aviation case involving a Coast Guard officer killed in a helicopter crash, the Supreme Court reaffirmed the doctrine. *Johnson v. United States*, 481 U.S. 681 (1987).

90. Recent examples include *Church v. Martin-Baker Aircraft Corporation*, 643 F. Supp. 499 (E.D. Mo. 1986) and *Wert v. General Dynamics*, 624 F. Supp. 401 (E.D. Mo. 1986).

91. 487 U.S. 500 (1988). This defense has a long history, and has generated a law review literature of tremendous substance. See generally Smith, *Defective Military Aircraft and the Government Contractor Defense: the Constitutional Difficulties that Arise Even After Boyle v. United Technologies Corp.*, 54 J. AIR L. & COM. 439 (1988). Litigation after the *Boyle* decision suggests that the defense may lead to fewer lawsuits against contractors, but the implications are still not fully developed. The most significant post-*Boyle* decision for the Air Force is *Harduvel v. General Dynamics*, 878 F.2d 1311 (11th Cir. 1989).

the most important aspects of this role is notification. Since the United States is not a party, HQ USAF/JACC may not be aware of the case or of developments in it, so claims officers should be careful to report receipt of discovery requests, deposition notices and even telephone calls from attorneys in these cases to keep HQ USAF/JACC informed.

One of the most important issues arising in aviation cases, both where the United States is a party and where it is not, is protection of limited use information in the safety program. The Safety Mishap Investigation, conducted under AFR 127-4, relies on promises of confidentiality to collect vital information and on the confidentiality of board proceedings, conclusions and recommendations to identify and help eliminate hazards.⁹² This confidentiality has been strenuously challenged, both in discovery in civil litigation⁹³ and under the provisions of the Freedom of Information Act.⁹⁴ The challenges have thus far been turned back with a fair degree of success, at least as far as the Air Force is concerned. Nevertheless, civil litigants have strong incentives to continue to challenge the safety program, and the Air Force has a stronger incentive to resist these challenges. The claims officer has to be sensitive to the potential for major harm to Air Force interests if the privilege is not defended to the utmost.

IV. CONCLUSION

Claims officers faced with aviation accidents, claims and litigation should keep two things in mind. First, the key to successful defense in these cases is a comprehensive, accurate and timely investigation to collect the facts, evidence and perishable documents. The claims officer is in the best position to contribute to the case at the start by assembling a first-rate claims file to support whatever decision will ultimately be made in the case.

Second, remember the importance of communication. Aviation cases often present unfamiliar issues, that is, issues that are unfamiliar to the claims office but which may be the subject of considerable expertise elsewhere in the Government. Do not hesitate to call other agencies who may be able to help; HQ USAF/JACC is a good place to start.

92. See AFR 127-4, para. 1-8.

93. The Supreme Court resolved the most serious of these challenges in favor of the Air Force. *United States v. Weber Aircraft*, 465 U.S. 792 (1984). Although *Weber* was brought under the Freedom of Information Act, its holding has greater implications for discovery in litigation since the Court recognized the privilege for aircraft accident investigations. For background on the privilege, and the need for it, see Moorman, *Executive Privilege and the Freedom of Information Act: Sufficient Protection for Aircraft Mishap Reports?*, 21 A.F. L. REV. 581 (1979).

94. 5 U.S.C. § 552. See *Badhwar v. United States Department of the Air Force*, 829 F.2d 182 (D.D.C. 1987); *Cooper v. Department of the Navy*, 558 F.2d 274 and 594 F.2d 484 (5th Cir. 1979). See generally Comment, *The Freedom of Information Act in Air Crash Discovery: Friend or Foe?*, 52 J. AIR L. & COM. 479 (1986).

Use of the FTCA Discretionary Function Exception in Sonic Boom and Low Overflight Litigation

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To accomplish its mission, the United States Air Force operates high performance military aircraft constantly throughout the world. The normal operations of these aircraft generate sonic booms and low overflights; some of these lead to claims for property damage and personal injury against the Air Force. The Air Force normally pays the meritorious claims; however, a very small percentage of the claims filed eventually go into litigation against the United States. This article explores the use of the discretionary function exception of the Federal Tort Claims Act (FTCA)¹ as it relates to sonic boom and low overflight litigation against the United States.

The article first discusses the FTCA and the discretionary function exception. Next it addresses the application of the discretionary function exception in sonic boom litigation. The article concludes with a discussion of the use of the discretionary function exception in low overflight litigation. The scope of this article is limited to military aviation litigation under the FTCA, and does not address litigation under other federal statutes, such as the Tucker Act.²

I. THE FTCA AND THE DISCRETIONARY FUNCTION EXCEPTION

A. Introduction to the FTCA

The United States, as the sovereign, was immune from suit at common law.³ Citizens who had claims for damages incurred as a result of the misfeasance of government employees could not obtain relief except through private relief bills in Congress.⁴ This led to an ever-increasing number of private relief bills in Congress. To remedy this situation, and to provide relief to the citizens, Congress enacted the FTCA on August 2, 1946,⁵ after nearly thirty years of consideration. As the Supreme Court stated in *Indian Towing Co. v. United States*,⁶

The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws.⁷

The FTCA is a limited waiver of sovereign immunity. Its effect was only to waive immunity from recognized causes of action and not to visit the Government with

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1. 28 U.S.C. §§ 1346(b), 2671-80.

2. 28 U.S.C. §§ 1346(a)(2), 1441.

3. *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

4. *Dalehite v. United States*, 346 U.S. 15 (1953).

5. Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 812 (1946).

6. *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

7. *Id.* at 68-69.

novel and unprecedented liabilities.⁸ Congress intended the FTCA to permit liability for "ordinary common law torts" but at the same time Congress wanted to ensure that certain governmental activities would not be disrupted by the threat of damage suits.⁹ The FTCA does this through its procedural and substantive provisions. For example, 28 U.S.C. section 1346(b) provides, in part, that:

Subject to the provisions of chapter 171 of this title, the district courts . . . shall have the exclusive jurisdiction of civil actions on claims against the United States, for money damages. . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.¹⁰

This exclusive grant of subject matter jurisdiction to the district courts is subject to the provisions of chapter 171, which include specific limitations and exceptions. If any of these limitations or exceptions apply, the courts lack subject matter jurisdiction, because sovereign immunity has not been waived. Waivers of sovereign immunity are strictly construed.¹¹ The discretionary function exception is one of these exceptions under the FTCA.

B. The Discretionary Function Exception to the FTCA

Congress enacted the discretionary function exception to protect the Government from "liability that would seriously handicap efficient government operations."¹² This is one of the most difficult and important issues in FTCA litigation. Section 2680 of Title 28 provides, in part, that:

The provisions of this chapter and section 1346(b) of this title shall not apply to—
(a) Any claim . . . based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.¹³

The discretionary function exception has been one of the most litigated exceptions to the FTCA. The Supreme Court noted in *Kosak v. United States*, that the exceptions to the FTCA have three objectives: "ensuring that 'certain governmental activities' not be disrupted by the threat of damage suits; avoiding exposure of the United States to liability for excessive or fraudulent claims; and not extending the coverage of the Act to suits for which adequate remedies were already available."¹⁴ Application of the discretionary function exception meets at least two of these objectives. If a case falls within the discretionary function, the court lacks subject matter jurisdiction.¹⁵

C. Seminal Court Decisions

The seminal Supreme Court decision construing the discretionary function exception is *Dalehite v. United States*.¹⁶ *Dalehite* was an action under the FTCA

8. *Dalehite*, 346 U.S. at 27-30.

9. *Feres v. United States*, 340 U.S. 135, 142 (1950).

10. 28 U.S.C. § 1346(b).

11. *Sherwood*, 312 U.S. at 588.

12. *United States v. Muniz*, 374 U.S. 150, 163 (1963).

13. 28 U.S.C. § 2680(a).

14. 465 U.S. 848, 856 (1984).

15. *Feyers v. United States*, 749 F.2d 1222, 1225 (6th Cir. 1984).

16. 346 U.S. 15.

against the United States for death, personal injury, and property damage that resulted from a disastrous explosion of fertilizer stored in vessels in the harbor at Texas City, Texas. The explosion killed many people and leveled much of the city, resulting in 300 personal injury and property claims amounting to \$200 million. Factories owned by the Government and operated by private contractors produced most of the fertilizer under a government program to increase the food production in the occupied countries after World War II. The Government retained the right to supervise, direct, control, and generally approve the work.

The stored fertilizer that exploded was produced from both governmental and private sources, each prepared in accordance with the advice of government experts.

With regard to *Dalehite*, the Supreme Court in *United States v. S.A. Empresa de Viaco Aerea Rio Grandense*,¹⁷ (*Varig Airlines*) noted some thirty years later:

Numerous acts of the Government were charged as negligent: the cabinet-level decision to institute the fertilizer export program, the failure to experiment with the fertilizer to determine the possibility of explosion, the drafting of the basic plan of manufacture, and the failure properly to police the storage and loading of the fertilizer.¹⁸

The district court in *Dalehite* found negligence on behalf of the Government and entered judgment for the plaintiffs. The Court of Appeals reversed, and the Supreme Court affirmed primarily on the basis that "for the reason that as a matter of law the facts found cannot give the district court jurisdiction of the cause under the Tort Claims Act."¹⁹

The Supreme Court stated that "One only need read section 2680 in its entirety to conclude that Congress exercised care to protect the government from claims, however negligently caused, that affected the governmental function."²⁰ The Court continued:

It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.²¹

This holding precluded government liability for actions involved with the fertilizer export program. The activities of the Government were not actionable due to the discretionary function exception of the FTCA. The Government was immune from liability resulting from decisions made at the planning or policy level, but could have been liable for injury that resulted from a negligent act at the operational level, had the court found any.

In the years that followed *Dalehite*, the discretionary function exception protected decisions made at the policy level. However, the courts held that once the Government makes a policy decision protected by the discretionary function exception, it must proceed with due care in the decision's implementation. For example, in *Indian Towing*,²² the Supreme Court held the Government liable for the negligent operation of a

17. 467 U.S. 797 (1984).

18. *Id.* at 810-11.

19. *Dalehite*, 346 U.S. at 24.

20. *Id.* at 32.

21. *Id.* at 35-36.

22. 350 U.S. 61.

lighthouse. The Court stated that the Government did not have to undertake the lighthouse service, but once it did, the Government had to exercise due care in its operation.²³

For thirty-one years after the *Dalehite* decision, many litigants tried to undermine it, and had increasing success over the years. However, in *Varig Airlines*,²⁴ the Supreme Court unanimously rejected the notion that *Dalehite* no longer was valid law concerning the discretionary function exception.

Varig Airlines and its companion case, *United States v. United Scottish Insurance Co.*, both involved allegations against the Federal Aviation Administration (FAA). In *Varig Airlines*, the plaintiff alleged that the FAA negligently certified the aircraft design as safe. In *United Scottish Insurance Co.*, the FAA allegedly issued a supplemental type certificate for installation of a heater that did not comply with FAA regulations. The Supreme Court held that the discretionary function exception of the FTCA barred both actions.

In *Varig Airlines*, the Supreme Court strongly affirmed its previous analysis and holding in *Dalehite*, and enumerated several factors useful in determining when the acts of a government employee are protected from liability by the discretionary function. First, "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case."²⁵ The basic inquiry is whether "the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability."²⁶ Second, whatever else the exception may include, "it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals."²⁷ Congress wished to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. The Supreme Court decision in *Varig Airlines*, along with *Dalehite*, represented the definitive analysis of the discretionary function exception to the FTCA.

The next major Supreme Court case to address the discretionary function exception was *Berkovitz v. United States*.²⁸ *Berkovitz* involved one federal agency's issuance of a license to produce a vaccine and another agency's approval of a particular lot of that vaccine for public release. Both agencies violated a federal statute and their own agency regulations in the case. In its decision, the Supreme Court reaffirmed the principles stated in *Dalehite* and *Varig Airlines*; however, it found that the discretionary function exception did not apply in *Berkovitz*. The Court held that "the exception does not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow" and leaves the employee "no rightful option but to adhere to the directive."²⁹ Thus the discretionary function exception will not apply when the acting federal employee has no discretion to use.

In *Berkovitz*, the Supreme Court outlined a two-pronged test to determine whether the discretionary function exception applies. For the exception to apply, the challenged conduct must involve a permissible element of judgment or choice. If the agency or employee fails to follow a mandatory statute or regulation, the exception will not apply. Secondly, if the challenged conduct does involve an element of judgment,

23. *Id.* at 69.

24. 467 U.S. 797.

25. *Id.* at 813.

26. *Id.*

27. *Id.* (footnote omitted).

28. 486 U.S. 531 (1988).

29. *Id.* at 536.

then the discretion must concern a governmental action or decision based on considerations of public policy, which the discretionary function exception was designed to shield. If no considerations of public policy are present, the exception will not apply.³⁰ *Berkovitz* clearly establishes that the United States cannot violate mandatory federal statutes or its own regulations and have the discretionary function exception protect it from liability.

II. APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION IN SONIC BOOM LITIGATION

A. Introduction to Sonic Boom Litigation

The United States has generally enjoyed success in sonic boom litigation. This success is partially attributable to the extensive scientific studies the Government conducted concerning the sonic boom phenomenon and also to the way in which the Government controls the supersonic operation of aircraft.³¹ An individual who wants to establish a valid FTCA claim against the United States for damage caused by a sonic boom must overcome two major obstacles to prove his case. First, he must establish that the operation of the aircraft at supersonic speed was negligent or wrongful. Second, he must prove that the sonic boom caused the damage. The United States normally asserts the discretionary function exception to the FTCA to counter the individual's allegations of negligent or wrongful conduct. If the United States does not prevail on a motion for summary judgment based on the discretionary function exception, the United States usually can establish through expert testimony that a sonic boom could not cause the damage for which the claimant seeks compensation.

One should note that the Supreme Court held in *Laird v. Nelms*,³² that damage caused by a sonic boom from a military aircraft was not actionable under the FTCA where no negligence was shown either in planning or operation of the flight. The Court held that the FTCA does not authorize suit against the Government based on a theory of strict liability. This case involved an allegation of property damage resulting from a sonic boom caused by a military plane flying high over North Carolina. The district court entered summary judgment for the United States, but the Fourth Circuit reversed. The Fourth Circuit held that although the plaintiffs had been unable to show negligence, they were, nonetheless, entitled to proceed on a theory of strict or absolute liability under state law for ultrahazardous activities conducted by the United States.³³ The Supreme Court reversed and held, *inter alia*:

The necessary consequence of the Court's holding in *Dalehite* is that the statutory language "negligent or wrongful act or omission of any employee of the Government," is a uniform federal limitation on the types of acts committed by its employees for which the United States has consented to be sued. Regardless of state law characterization, the Federal Tort Claims Act itself precludes the imposition of liability if there has been no negligence or other form of "misfeasance or nonfeasance" on the part of the Government.³⁴

The Supreme Court also held that high altitude flight does not constitute trespass upon the land over which the aircraft flies. The Court concluded its opinion by stating that, in light of its reaffirmation of the FTCA construction in *Dalehite*, it was

30. *Id.* at 537.

31. See Air Force Reg. (AFR) 55-34, Reducing Flight Disturbances (Feb. 1984).

32. 406 U.S. 797, *reh'g denied*, 409 U.S. 902 (1972).

33. *Id.* at 798.

34. *Id.* at 799(citation omitted).

unnecessary to examine the scope of the discretionary function exemption contained in the FTCA and thus did not address whether the discretionary function exception also precluded recovery.³⁵ The decision in *Laird v. Nelms*, eliminated strict liability under state law as a basis for suits against the United States under the FTCA.

B. Sonic Boom Litigation Where the Courts Found the Discretionary Function Exception Applicable

The United States prevails in the vast majority of the suits filed against it for damages allegedly resulting from sonic booms. This section surveys decisions where the courts have found the discretionary function applicable. The United States usually wins such cases on a motion for summary judgment.

In *Maynard v. United States*,³⁶ the Ninth Circuit held that the Government, under the discretionary function exception to the FTCA, was immune from liability for injuries allegedly caused by a sonic boom. *Maynard* involved a sonic boom generated by an SR-71 aircraft. The plaintiff alleged that she sustained severe injuries when the horse on which she was riding became frightened by a sonic boom created by a government aircraft. She sued on the basis that the Government negligently selected the route. In support of its motion for summary judgment, the United States filed unopposed affidavits that showed that the Commander of Strategic Air Command made the decision to conduct operational training flights at supersonic speeds, and the Chief of the Navigation Section at the base where the aircraft was assigned made the route selection. This established that the conduct of the training flights and the route selection fell within the discretionary function. The district court granted the Government's motion for summary judgment. The Ninth Circuit affirmed and held that the route selection, even if negligent, was within the discretionary function exception to the FTCA because it was an act of a subordinate taken in furtherance of governmental policy.

Similarly, in *Abraham v. United States*,³⁷ the Fifth Circuit held that the plaintiffs could not recover against the United States on a theory of strict liability. *Abraham* involved a sonic boom that allegedly caused the explosion and subsequent burning of a mill, resulting in Abraham's death. The United States filed a motion for summary judgment that the district court granted. The Fifth Circuit affirmed, holding that the plaintiffs could not recover on a theory of strict liability for ultrahazardous activity, nor had the plaintiffs shown the court any evidence that would support their theory that the proximate cause of the sonic boom was operational mismanagement.

Numerous other cases have upheld military supersonic flights as within the discretionary function exception. *Huslander v. United States*³⁸ was a New York case involving a claim for personal injuries allegedly sustained as a result of a sonic boom. The United States filed a motion for summary judgment, along with supporting affidavits. The district court granted the motion. *Schwartz v. United States*,³⁹ was a North Dakota case that involved a claim for property damages allegedly resulting from a sonic boom caused by negligent aircraft operation. The United States filed a successful motion for summary judgment. *McMurray v. United States*⁴⁰ was a Missouri

35. *Id.* at 803.

36. 430 F.2d 1264 (9th Cir. 1970).

37. 465 F.2d 881 (5th Cir. 1972).

38. 234 F. Supp. 1004 (W.D.N.Y. 1964).

39. 38 F.R.D. 164 (D.N.D. 1965).

40. 286 F. Supp. 701 (W.D. Mo. 1968).

case where plaintiff claimed property damage allegedly resulting from numerous sonic booms. During a separate trial to determine whether the discretionary function exception applied, the United States filed affidavits to support its application. The district court found that the discretionary function exception applied and entered judgment for the United States.

In *Ward v. United States*,⁴¹ the Third Circuit distinguished negligence at the planning level from negligence at the operational level. *Ward* was a decision in which a sonic boom allegedly caused an automobile to fall on Ward while he was working on it. The United States moved for summary judgment, along with supporting affidavits, and the district court granted the motion. On appeal, the Third Circuit reversed and remanded, stating that while the discretionary function exception applied to negligence at the planning level, it did not apply to operational negligence. The Third Circuit remanded the case for a determination of the possibility of operational negligence.

A number of other cases relied on a lack of causation, sometimes even assuming the existence of negligence, to find the United States not liable for damages. Some examples are *Brown v. United States*,⁴² *Dabney v. United States*,⁴³ *Tabb v. United States*,⁴⁴ *Lorick v. United States*,⁴⁵ and *Hartmann v. United States*.⁴⁶

C. Sonic Boom Litigation Where the Courts Found the United States Liable

Very few reported court decisions have found the United States liable for damages resulting from sonic booms. Those decisions rely on operational level negligence or causation to hold the United States liable.

In *United States v. Gravelle*,⁴⁷ the Tenth Circuit affirmed a judgment for the property owners. *Gravelle* involved the sonic boom test flight program over Oklahoma City. That program included more than 1200 test flights at supersonic speeds. The Tenth Circuit, without discussing the discretionary function exception, stated that the Government deliberately exposed the plaintiffs to sonic booms to determine what, if any, damage would result to property and person. As such, the Government was liable for the damage that resulted.

In *Neher v. United States*,⁴⁸ the district court in Minnesota held that the United States was liable for damages resulting from sonic booms. *Neher* involved the designations of a supersonic corridor over a densely populated area for the purpose of conducting flight tests, when it was possible to designate the corridor over sparsely populated areas. The court held the United States bound by a stipulation it had entered that waived certain defenses, including any reference to the discretionary function exception, and held that the discretionary function exception is a defense that must be affirmatively pled or it is waived. Because the United States had previously waived any reference to the discretionary function exception, the court would not consider it. The court adjudged the case without discussing the merits of the discretionary function exception defense and awarded recovery to the plaintiff.

41. 471 F.2d 667 (3d Cir. 1972).

42. 230 F. Supp. 774 (D. Mass. 1964).

43. 249 F. Supp. 599 (D.N.C. 1965).

44. 267 F. Supp. 187 (M.D. Ga. 1965).

45. 267 F. Supp. 96 (D.C.S.C. 1967).

46. 419 F.2d 829 (9th Cir. 1969).

47. 407 F.2d 964 (10th Cir. 1969).

48. 265 F. Supp. 210 (D. Minn. 1967).

III. APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION IN LOW OVERFLIGHT LITIGATION

A. Introduction to Low Overflight Litigation

The United States has not enjoyed the same level of success in low overflight litigation as it has in sonic boom litigation. Courts have held the United States liable for damages arising from low overflights.⁴⁹ The basis for liability is usually operational level negligence by the aircrew. If no operational level negligence is present, application of the discretionary function exception normally results in the court finding no FTCA liability on behalf of the United States as a result of its overflight activities.

B. Liability of the United States for Operational Negligence in Low Overflight Operations

Most of the reported decisions involving negligent overflight contain allegations of flight at less than the prescribed minimum altitudes. Air Force⁵⁰ and Federal Aviation Regulations⁵¹ have similar restrictions concerning minimum altitudes for flight. Over congested areas of cities, towns, or assemblies of persons, the aircraft must fly at an altitude no lower than 1000 feet above the highest obstacle within a 2000-foot radius of the aircraft.⁵² Over other than congested areas, the aircraft must fly at an altitude no lower than 500 feet above the surface, except over open water or sparsely populated areas, in which case the aircraft may not fly closer than 500 feet to any person, vehicle, or structure.⁵³ Overflight below these minimum altitudes or minimum distance is normally considered negligent operation of the aircraft. If the court finds that the aircrew operated the aircraft below the prescribed minimum altitude (closer than the 500 foot distance, if applicable), that will normally constitute operational negligence.

Applying the analysis of *Varig Airlines*⁵⁴ and *Berkovitz*,⁵⁵ the discretionary function exception to the FTCA will not exempt the United States from liability when operational negligence is present. When an aircrew operates the aircraft below the prescribed minimum altitude or distance, that decision or negligent act is at the operational level. The aircrew has no discretion to exercise and must comply with the regulations applicable to minimum altitudes of flight. If the aircrew violates prescribed minimum altitudes, the discretionary function exception will not exempt the United States from liability.

Numerous cases have found the United States liable for damages resulting from flight at less than prescribed minimum altitudes. For example, in *Wildwood Mink Ranch v. United States*,⁵⁶ the court held the United States liable when a pilot without excuse flew over a heavily populated area below the minimum altitude prescribed by regulation. Also in *Peterson v. United States*,⁵⁷ discussed more fully below, the appeals

49. E.g., *Peterson v. United States*, 673 F.2d 237 (8th Cir. 1982) (Personal injury and property damages awarded to plaintiff as a result of low-level flight); *Dahlstrom v. United States*, 228 F.2d 810 (10th Cir. 1956) (Personal injury damages imposed due to horse bolting after low aircraft overflight).

50. AFR 60-16, General Flight Rules, para. 5-9.

51. Fed. Aviation Reg. (FAR) § 91.79.

52. AFR 60-16, para. 5-9c; FAR § 91.79(b).

53. AFR 60-16, para. 5-9d; FAR § 91.79(c).

54. 467 U.S. 797 (1984).

55. 486 U.S. 531 (1988).

56. 218 F. Supp. 67 (D. Minn. 1963).

57. 673 F.2d 237 (8th Cir. 1982).

court found that the pilot flew below the minimum prescribed altitude and directed the district court to hold the United States liable for damages on remand. In numerous other cases involving overflights below minimum altitudes, the courts have held the United States liable.⁵⁸

C. Results from Application of the Discretionary Function Exception in Two Low Overflight Litigation Cases

In the following two cases the United States successfully asserted the discretionary function exception at the trial level. However, in both cases, the district court judgment was reversed on appeal.

In *Dahlstrom v. United States*,⁵⁹ pilots for the Civil Aeronautics Administration made low-level flights over a city to determine the altitude of possible landing obstructions to an instrument approach. The low overflight, estimated at 100 feet above ground level, frightened a team of horses that bolted and ran over the plaintiff. The district court granted judgment for the United States, based on the discretionary function exception to the FTCA. The Eighth Circuit reversed and remanded, ordering the district court to make a specific finding whether the pilots were guilty of operational negligence proximately causing injury to the plaintiff, and to award damage if they were and deny if they were not.

In *Peterson v. United States*,⁶⁰ a B-52 bomber aircraft flew over Peterson's farm at an altitude of 500-550 feet. The bomber flew on a low-level route during an Operational Readiness Inspection flight mission. Peterson claimed that the overflight frightened his dairy cows while he was milking them, resulting in personal injury to him, and eventually the death of some of his cows. Peterson, his wife, and son estimated the altitude of the aircraft to be seventy-five feet. The pilot could not state for certain that he never flew the aircraft less than the approved altitude of 550 feet. Additionally, the aircraft had problems with its navigational instruments. The district court held that the flight crew exercised due care in the exercise of their duties, and that under the discretionary function exception to the FTCA the United States was not liable. The district court then dismissed the complaint. The Eighth Circuit found that the district court was clearly erroneous and reversed, holding that the plaintiff produced credible evidence that the plane flew below acceptable limits and established a *prima facie* case of liability. The court found that the discretionary function exception protected the United States at the planning level of the route development but did not protect the United States from operational negligence in carrying out the mission. The court then directed that the district court find the Government negligent and determine the amount of plaintiff's damages.

D. Related Issues Not Within the Scope of the FTCA

Two other issues arise in low overflight cases and are not within the scope of the FTCA. Those issues are whether the United States has nuisance liability for the noise and vibration associated with low overflight and whether a compensable "taking" has occurred. If nonnegligent, nuisance liability is a form of strict or

58. E.g., *Dahlstrom*, 228 F.2d 819 (10th Cir. 1956); *Weisberg v. United States*, 193 F. Supp. 815 (D. Md. 1961); *Long v. United States*, 241 F. Supp. 286 (W.D.S.C. 1965); *Leisy v. United States*, 102 F. Supp. 789 (D. Minn. 1952).

59. 129 F. Supp. 772 (D. Minn. 1955), *rev'd*, 228 F.2d 819 (10th Cir. 1956).

60. 673 F.2d 237 (8th Cir. 1982).

absolute liability. As such it is not cognizable under the FTCA.⁶¹ The "taking" issue likewise is not cognizable under the FTCA. An individual must pursue the "taking" issue under the Tucker Act⁶² in the United States Claims Court. To prevail on the "taking" issue, a plaintiff must prove that the overflights were "so low and frequent as to be a direct and immediate interference with the enjoyment and use of the land."⁶³ However, neither the nuisance issue nor the "taking" issue are cognizable under the FTCA.

IV. CONCLUSION

The discretionary function exception to the Federal Tort Claims Act protects the United States from tort liability that would otherwise seriously affect military flight operations. Given the recent Supreme Court decisions construing the discretionary function exception, one can expect continued viability of the exception in litigation against the United States. In sonic boom and low overflight litigation, the discretionary function exception should continue to protect the United States from liability, provided no operational negligence is present.

61. *Dalehite*, 346 U.S. at 44-45; *Nelms*, 406 U.S. 797.

62. 28 U.S.C. §§ 1346(a)(2), 1491.

63. *United States v. Causby*, 328 U.S. 256, 266 (1956).

The Government Contractor Defense: The Limits of Immunity After *Boyle*

MAJOR JOHN J. MICHELS, JR., USAF

Protection is not a principle, but an expedient.
Benjamin Disraeli, 17 Mar. 1845

On April 27, 1983, a Marine CH-53D helicopter crashed into the sea off the coast of Virginia. The copilot, David Boyle, was killed when he was unable to open the escape hatch on his side of the cockpit and drowned in the sinking helicopter. Unfortunately, fatal helicopter accidents are all too common, but this accident paved the way for a major statement by the Supreme Court in, *Boyle v. United Technologies Corp.*¹

This article examines what has come to be known as the government contractor defense in the aftermath of the Court's decision. It begins with a brief look at the *Boyle* opinion and dissent, which articulated the basic elements of the government contractor defense (the defense) and provides a philosophical basis for attacks on the defense. It then discusses the defense's foundation of policy considerations in addition to the statutory basis laid out by the Court in its opinion. Recent interpretations of the defense as fashioned by the Court are then explored, with an eye to the various ways plaintiffs now seek to circumvent the defense. Finally, this article examines possible actions for the contractor to preempt the recent assaults on the defense.

I. *BOYLE V. UNITED TECHNOLOGIES CORPORATION*

At the time the case arrived at the Supreme Court, the facts were relatively straightforward. Boyle, the copilot of a helicopter manufactured for the Marine Corps by ITT, drowned when unable to open the escape hatch of the helicopter after it went down in the Atlantic Ocean near Norfolk, Virginia. The hatch was designed to open outward, but the pressure of the seawater prevented Boyle from pushing it open.² Boyle's father alleged negligent design of the hatch under Virginia law, arguing that the hatch should have opened inward in contemplation of being used when the helicopter was submerged.³

Justice Scalia wrote the opinion for the Court, noting first the basis for the government contractor defense in the court below. He then addressed the concept used to justify the creation of new federal common law—the intrusion of state law into an area of traditionally federal concern. He ended his discussion of the grounds for the creation of the defense by dismissing the Fourth Circuit's reliance on

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1. 487 U.S. 500 (1988).

2. *Id.* at 502-03.

3. *Id.* The petitioner also alleged United Technologies Corporation (UTC) defectively repaired the servo in the automatic flight control system, causing the crash. The Court of Appeals directed judgment for UTC, holding that, as a matter of Virginia law, the petitioner failed to meet his burden of showing the repair work of the Navy was not responsible for the alleged malfunction of the flight control system. *Id.* at 503.

governmental immunity under the *Feres*⁴ doctrine and noting that the basis for the defense was to be found in the Federal Tort Claims Act (FTCA).⁵

Under the FTCA the Federal Government waives its traditional sovereign immunity in virtually all cases, except those where the Government's negligence results from agents using their discretion.⁶ Justice Scalia reasoned that allowing contractors to be sued for producing products that were the result of federal governmental discretion in design and operation would be counter to the intent of the FTCA to shield discretionary federal acts from tort liability.⁷ The tangible end result would be that the Government would pay more for its equipment, as contractors passed along the cost of liability insurance and judgments.⁸

Justice Scalia approved a three-part test for contractors wishing to assert the defense against claims of negligence. The first is government "approval of reasonably precise specifications."⁹ The second is that the contractor produced equipment conforming to those specifications.¹⁰ And the third is that the contractor informed the Government of all dangers known to it concerning the equipment, but not known to the Government.¹¹

According to the Court, the first two requirements simply ensure that there is a federal interest present in the design and production of the equipment in question, *i.e.*, that the Government did in fact exercise its discretion in procuring a product.¹² The last requirement operates to ensure that a manufacturer has no incentive to hide potential dangers from the Government, knowing that it would always be shielded from liability and not wishing to jeopardize its status with the Government as a result of producing defective equipment.¹³

Justice Scalia's opinion validates the defense as a proper exercise of federal preemption of state tort law, standardizes the defense throughout the circuits,¹⁴ and arguably extends the scope of the defense to cover cases involving nonmilitary equipment and plaintiffs.¹⁵

Three Justices dissented from the majority. The lead dissent opinion, written by Justice Marshall, identified three problems with the majority view of the defense. First, the defense as crafted by Justice Scalia was too broad. Second, the results from the new defense would be overly harsh in denying liability recompense

4. *Boyle v. United Technologies Corp.*, 792 F.2d 413, 414 (1986), citing *Tozer v. LTV Corp.*, 792 F.2d 403, 408 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233, (1988). The *Feres* doctrine originated with the Court's decision in *Feres v. United States*, 340 U.S. 135 (1950). The Court held that military servicemembers may not sue the United States for injuries resulting from federal negligence when the injuries occurred incident to service. The result was the virtual elimination of tort suits against the United States by servicemembers injured on active duty.

5. 28 U.S.C. § 1346(b).

6. 28 U.S.C. § 2680.

7. *Boyle*, 487 U.S. at 511.

8. *Id.*

9. *Id.* at 512.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 512-13.

14. In the Eleventh Circuit, the government contractor defense operated only where the contractor participated minimally in the design of the defective equipment or the contractor timely warned the Government of the risks in the design and alternatives, and the Government went ahead with the design although apprised of the risks. *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 487 U.S. 1233 (1988). In the Fifth Circuit, the test involved the same elements as the *Boyle* test with the addition of the element that the Government had to be immune from suit by the plaintiff. *Bynum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985).

15. *Boyle*, 487 U.S. at 510. Justice Scalia noted that basing the defense on *Feres* would lead to protection for contractors that was too narrow, in that only military servicemembers injured by government equipment would be prohibited from suing under the defense. *See also*, Dissent, at 516.

to the deserving party. Third, and most significant, the preemption of state tort law by federal common law was a usurpation of power normally reserved for the legislature.

Justice Brennan noted that the defense represented an unprecedented extension of governmental immunity, covering those far removed from federal law and the functioning of the federal government.¹⁶ Federal immunity traditionally was extended only to officials of the Federal Government, acting in the scope of their employment, involved in "discretionary functions." He stated that the policy reasons for extending immunity to government contractors simply do not equate with the reasons for immunizing government employees.¹⁷

The application of the defense as stated by the majority would also lead to unduly harsh results. Justice Brennan stated that civilians would be precluded from suing even if they were injured as a result of an item of nonmilitary equipment.¹⁸ In a corollary to his concerns about the extension of the immunity well past its previous limits, he opined that children injured by the negligently designed helicopter in *Boyle* would be prevented from suing the contractor had the machine crashed on a public beach instead of at sea.¹⁹ Finally, Justice Brennan, citing the lack of concern the defense has for the contractor's culpability, indicated that the defense applied, "regardless of how blatant or easily remedied the defect, so long as the contractor missed it and the specifications approved by the government . . . were 'reasonably precise.'"²⁰

But most of the dissent related to the proper role of the Court; *i.e.*, whether the majority is overstepping its authority by fashioning a new federal interest and common law. Justice Brennan believed the majority was invading the province of Congress by fashioning a defense based on an inflated and unauthorized concern for the coffers of government and industry.²¹ The dissent cited the principles enumerated in *Erie Railroad Co. v. Tompkins*²² for the proposition that the Court in *Boyle* went too far. Justice Brennan indicated that there is no significant federal interest being affected, and that the concern of the majority for monetary loss to the Federal Government from increased equipment costs is a matter for Congress, not for the Court.²³ The separate dissent filed by Justice Stevens followed a similar rationale, asserting that "[w]hen the novel question of policy involves the balancing of the conflicting interests . . . of a massive governmental program and the protection of the rights of an individual . . . I feel very deeply that we should defer to the expertise of the Congress."²⁴

16. *Boyle*, 487 U.S. at 522-23.

17. Justice Brennan wrote that tort liability was less of an influence on a contractor than on a government employee, that inhibiting government employees from acting because of tort liability was a greater threat to the administration of government than the threat of inhibiting a contractor, and tort suits against contractors would rarely consume the time and energies otherwise devoted to governmental service. *Id.* at 523-24.

18. *Id.* at 516. Justice Brennan noted the defense would apparently apply "to any made to order gadget . . . from NASA's Challenger space shuttle to the Postal Service's old mail cars."

19. *Id.*

20. *Id.* Of course, the question of whether the contractor knew of the defect will be a matter of fact for the jury or judge to decide in each case. A contractor would be hard-pressed to claim that a glaring defect was undiscovered until after the accident, given the nature of testing performed on government-designed equipment. *See, e.g., Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698 (4th Cir. 1989).

21. *Id.* at 516.

22. 304 U.S. 64 (1938).

23. Indeed, it appears that Congress considered several bills designed to limit contractor liability and rejected all of them. *See, e.g., H.R. 4765*, 99th Cong., 2d Sess. (1986). S 2441, 99th Cong., 2d Sess. (1986).

24. *Boyle*, 487 U.S. at 532.

II. POLICY CONSIDERATIONS BEHIND THE GOVERNMENT CONTRACTOR DEFENSE

Although the Court in *Boyle* enumerated only the protection of the discretionary function of the Federal Government as a rationale in its adoption of the defense, there are several implicit policy considerations supporting the defense's creation and adoption. These include the inapplicability of normal tort law theories to the procurement of government equipment; the lack of expertise in the courts to deal with military equipment procurement; potential increased cost of government-designed equipment; the doctrine of sovereign immunity; and the ability of the Federal Government to get goods corresponding to government needs.

A. The Inapplicability of Traditional Tort Liability

Military equipment has been the subject of much of the litigation under the defense.²⁵ The very nature of military equipment, and the Government's means of procuring it, argue strongly against the application of normal tort law principles in liability cases where such equipment is involved.

The balancing process in traditional tort analysis between the utility of the defective equipment and the cost of injuries resulting from the defect²⁶ is invalid when applied to military equipment, because the equipment's safety is only one of many factors in determining whether to buy or produce the product. Factors that are mundane in the civilian world, such as durability or ease of maintenance, become extraordinarily important in combat, and possess life-threatening implications of their own.²⁷ To single out safety of operations as the dominant factor for holding a contractor liable would be to introduce into the governmental procurement decision a false shift in relative importance of the many factors a military designer must consider.

Imposing liability costs on the manufacturer of military equipment does not act as a deterrent against producing shoddy work, because the decision to buy a weapon is not made in a free-market context. The Government is immune from suit by servicemen injured as a result of defective equipment,²⁸ and has no incentive to purchase completely safe equipment. In addition, the demand for military equipment is relatively inelastic, and the costs of liability would not tend to affect the decision to purchase a particular piece of equipment.²⁹ A corollary to this is that using liability to raise the price to the Government for military equipment would not tend to affect demand for the product. Because of the intense and rigorous testing program

25. See, e.g., *Zinck v. ITT Corp.*, 690 F. Supp. 1331 (S.D.N.Y. 1988); *McKay v. Rockwell International Corp.*, 704 F.2d 444 (5th Cir. 1983), cert. denied, 464 U.S. 1043 (1984); *In re Air Crash at Mannheim*, 769 F.2d 115 (3d Cir. 1985); *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311 (11th Cir. 1989); cert. denied, —U.S.—, 110 S.Ct. 1479 (1990); *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989); cert. denied, —U.S.—, 110 S.Ct. 327; *Garner v. Santoro*, 865 F.2d 629 (5th Cir. 1989).

26. See, e.g., Wade, *On the Nature of Strict Tort Liability for Products*, 44 MINN. L.J., 825 (1973).

27. See, e.g., A. HADLEY, *THE STRAW GIANT* 242-73 (1986).

28. See *supra* note 4.

29. The principal consideration for military procurement is whether the weapon will perform as advertised in combat. An aircraft that puts its weapons on target with regularity, even if dangerous and demanding to fly, is likely to be purchased regardless of whether it costs more money because of potential damage claims from lawsuits. At some point the weapon becomes too expensive, of course, but with the high cost of many weapons systems, liability costs would remain an insignificant portion. Therefore, there is little or no incentive to reduce the danger inherent in the design.

involved in buying most military equipment, the Government is usually aware of virtually all potential risks in using its equipment prior to buying.³⁰ The added costs of those risks simply are another factor considered in buying the weapon.

It also make little sense to hold the manufacturer liable under traditional tort theory when the Government is the sole determiner of how and under what conditions the equipment is used, and how much training is adequate for the end users of the equipment. The manufacturer would face liability for matters well outside its control.³¹ Such a situation renders meaningless the concept of incentives to produce a safe product.

Finally, the users of military equipment are substantially different from users of goods in the civilian world. Servicemembers are, by virtue of their jobs, exposed to more danger and risk. These risks, including the risks involved in using government-procured equipment, are generally known to them before they join the military, and their expectation of safety is much lower than that of their civilian counterparts.³²

B. The Lack of Judicial Expertise

The presence of a discretionary federal interest in the design of equipment implies a particular reluctance on the part of the judiciary to intervene in what it refers to as military affairs. The *Boyle* majority noted that selection of military equipment involves the balancing of technical and military considerations, including the trade-off between safety and combat effectiveness.³³

This balancing process, which is also a normal aspect of traditional tort liability, would force the courts to intrude upon the thought processes of military officials, traditionally a nonjusticiable subject.³⁴ The judicial branch of government, both judges and juries, is particularly unsuited to determine how, when, and in what manner to use military equipment.³⁵

The creation and affirmation of the defense is a tacit recognition that even though the contractor is manufacturing the product, the involvement of the Government to the extent required by the defense renders the decisions in designing and employing the equipment essentially military ones. Questioning military needs and specifications would require military members to testify as to their rationale for their decisions. Such an intrusion into national security would bring the courts into an area where they have little expertise, and would raise concerns about separation of powers.³⁶

Failure to adopt the defense, at least in the context of military products, would move the courts into an area where they not only have little knowledge or experience but no constitutional business as well.

30. *Zinck*, 690 F. Supp. at 1337.

31. See, e.g., *Crossan v. Electron Tube Division*, 693 F. Supp. 528 (E.D. Mich. 1986).

32. This has been recognized by several courts, see *Zinck*, 690 F. Supp. 1331 (S.D.N.Y. 1988) and *Harduvel*, 878 F.2d at 1322.

33. *Boyle*, 487 U.S. at 511.

34. See, e.g., *Tozer v. LTV Corp.*, 792 F.2d 403, 406 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988).

35. *Zinck*, 690 F. Supp. at 1333-34.

36. See *McKay v. Rockwell Int'l Corp.*, 704 F.2d at 449; and *Tozer*, 792 F.2d, at 406. One commentator argues against adoption of the government contractor defense under this rationale, noting that the making of military policy is "factually, theoretically and legally separate from weapons manufacture. . . . The weapons industry is not a part of the military; its members have no unique responsibility to fashion policy or strategy." Kellman, *National Law Journal*, Apr. 18, 1988, at 30, col. 1, 3. Whether one agrees with his assessment of the role of defense contractors in affecting military policy, it is indisputable that the type of weapons purchased by the military do influence tactics and military strategy. See J. FALLOWS, *NATIONAL DEFENSE* 77-106 (1982).

C. Increased Cost of Government Equipment

Although heavily criticized by the dissent,³⁷ the Court's concern with the effect of tort liability on the price the Government would pay for its equipment has been recognized in other settings, particularly where military products are involved.³⁸

That costs would rise as a result of liability seems axiomatic. Contractors would be expected to raise prices either to establish a "war chest" of funds to pay judgments, or to pay for liability insurance against lawsuits. The Court in *Boyle* states that the passing along of these expenses to the Government would ultimately frustrate the purpose of the FTCA³⁹ in keeping the Government immune from tort liability.

The government contractor defense, therefore, acts as a means of limiting the cost increases in government-designed equipment due to increasing liability or insurance costs.

D. Sovereign Immunity

The defense also serves as a means of shoring up governmental immunity laid out by the Court in *Feres* and under the FTCA exception for claims against the Government for combat operations.⁴⁰

The Government is immune, under the *Feres* holding,⁴¹ from suits by servicemen injured incident to service. Allowing servicemen to sue the contractor, with the costs then passed along to the Government, would undermine the basic protection established for the Government under *Feres*. Although Justice Scalia rejected *Feres* immunity as a source of the conflict between state and federal law, the maintenance of that immunity is an important policy consideration in the establishment of the defense.⁴²

The FTCA, although generally eliminating government immunity from tort actions, specifically bars any claim against the Government resulting from combat activities of military forces or the Coast Guard in time of war.⁴³ Application of tort liability to defense contractors for injuries caused by their products would serve to undermine the rationale for this immunity: protecting the government fisc at a time when it is already severely burdened.⁴⁴ The defense also works to protect the producers of important military equipment during wartime, keeping their assets safe from judgments while the country is in dire need of their services.

E. The Government's Ability to Obtain Needed Products

Perhaps the most important policy consideration behind the adoption of the government contractor defense is the effect of tort liability on the Government's ability to acquire goods corresponding to its needs. This concern for the Government's interests in meeting its needs is implicit throughout all the other policy considerations listed above.

37. *Boyle*, 487 U.S. at 521.

38. *McKay*, 704 F.2d at 449.

39. See *supra* note 6.

40. 28 U.S.C. § 2680 (j).

41. *Id.* at § 1346(b).

42. Several other courts embraced the *Feres* immunity as the basis for the usurpation of state tort law, e.g., *Tozer*, 792 F.2d 403 (4th Cir. 1986); *Bynum*, 770 F.2d 556 (5th Cir. 1985); *Mannheim*, 769 F.2d 115 (3d Cir. 1985) a testament to the importance attached by the courts to the preservation of the immunity.

43. 28 U.S.C. § 2680 (j).

44. This rationale assumes, of course, that the costs of the suits would normally be passed along to the Government. See *supra* text accompanying section IIC.

The most immediate effect of contractor liability would be to limit the number of suppliers that supply the Government with goods. Fewer manufacturers would provide the Government with equipment if faced with the prospect of liability for products over which they have no say in terms of use and instruction.⁴⁵ Nor would contractors be expected to bid aggressively for a contract where they could not predict costs accurately (due to the uncertainty of liability) or where they could not control the specifications of the project or how the project would be completed.⁴⁶

The defense also forces a more open dialogue between the government agency and the contractor concerning the product. In fact, some decisions indicate that such back and forth dialogue concerning design and manufacture is an important part of the Government's approval of "reasonably precise specifications."⁴⁷ Without the defense, a contractor would have no incentive fully to share its knowledge of any product defects.⁴⁸ Such continuous participation in the design process enhances the likelihood that the Government receives what it requests for from the contractor.

Finally, the defense acts to promote the ability of the Government to purchase the best and most sophisticated equipment available, even when that equipment is at the limit of workable technology. Contractors would be unwilling to incur the risks inherent in these new technologies without either more control over the use and development of the product, or immunity from the liability that invariably arises when the new technology fails.⁴⁹

III. THE PLAINTIFFS STRIKE BACK: THE ASSAULT ON THE GOVERNMENT CONTRACTOR DEFENSE

The response by the plaintiff's bar to the extension of immunity in *Boyle* has been varied and creative. Because of the requirements for establishing the defense, most of the injured parties' efforts have been aimed at factually distinguishing their situations from the three-part test. These efforts include: attempting to show that the Government failed to approve the design of the defective product; that the defect causing the tort was actually a manufacturing defect and not a design defect; and that the contractor failed to warn the Government, or still had a duty to warn users about some aspect of the product.

A. Government Approval of the Design

Of the three requirements laid out by the *Boyle* Court, whether there was government approval of reasonably precise specifications for the defective product appears to be the most problematic. A number of cases deal with the rationale for the approval requirement, that is, that the Government must have a significant interest in the product before federal common law can usurp state tort law.⁵⁰ Other cases deal directly with the definition of "approval" and how much detail is required of the Government in accepting a design from a contractor.

In approving the specifications for a product, the Government must have exercised its discretion for the defense to apply. Without the exercise of this discretion, there is no federal interest to supplant state tort law considerations and no justification for

45. *Zinck*, 690 F. Supp. at 1334.

46. *Beaver Valley Power v. National Engineering*, 883 F.2d 1210 (3d Cir., 1989).

47. See *Harduvel*, 878 F.2d at 1320.

48. See *Boyle*, 487 U.S. at 512-13; *Zinck*, 690 F. Supp. at 1334; *Kleeman*, 890 F.2d 698 (4th Cir. 1989).

49. *McKay*, 704 F.2d at 449-50; *Zinck*, 690 F. Supp. at 1334.

50. *Boyle*, 487 U.S. at 507. See note 12 and accompanying text.

the immunity.⁵¹ Several courts noted that where the government contracting officer merely "rubber-stamps" approval of a design, there has been no exercise of discretion by the federal agency, because there is no thoughtful consideration of the implications of the design.⁵² In fact, the Court in *Boyle* essentially said as much when it noted that the direct purchase from civilian contractors of "off-the-shelf" items such as air conditioners or helicopters would not involve government discretion and would not come under the defense.⁵³

As indicated above, the nature of the equipment purchased can hold clues as to the degree of the government interest involved. A contractor producing items normally considered commercial in nature has less protection because, by definition, there is less government involvement in the design process.⁵⁴ In fact, some courts have gone so far as to hold *Boyle* applicable only to military products, stating that without the link to the military, there is no federal interest encroached by state law.⁵⁵ Where the injury resulted from a nontangible element of the contract, such as a performance schedule, the contract will have to show that the schedule was a necessary consequence of the overall project in order to show an exercise of government discretion.⁵⁶

Courts also wrestled with the notion of approval and what that term means. The federal agency must approve "reasonably precise specifications" for immunity to attach. How far the Government must go in reviewing the design has been viewed differently, sometimes within the same circuit. In *Trevino v. General Dynamics Corp.*,⁵⁷ the court held that the Government must engage in a careful review of the work and design choices. Review of the work for very general performance criteria or retention of the right of final approval do not, by themselves, constitute approval under the defense. The Government must make a "substantive review" of the work and design choices.⁵⁸ A recent case from New York also discusses the meaning of approval within the *Boyle* context. *Deniston v. Boeing*,⁵⁹ as with *Boyle*, involved a fatal Marine helicopter crash. In denying the defendant's motion for summary judgment (and drawing heavily on the language from *Trevino*), the court held that although the Navy contract called for Navy approval of the procurement contract, the court would not assume such approval was present: "Constructive approval will not suffice to fulfill the first element of the *Boyle* test; only actual approval will suffice."⁶⁰ The court also held that the specifications approved by the Government were not detailed enough to be "reasonably precise."⁶¹

51. *Boyle*, 487 U.S. at 504.

52. See *Trevino*, 865 F.2d 1474 (5th Cir. 1989); *Beaver Valley Power*, 883 F.2d 1210 (3d Cir. 1989).

53. *Boyle*, 487 U.S. at 509. See also *Niemann v. McDonnell Douglas*, 721 F. Supp. 1019, 1022 (S.D. Ill. 1989).

54. *Niemann*, 721 F. Supp. at 1023.

55. *Hawaii Asbestos Cases*, 715 F. Supp. 298, 300 (D. Haw. 1988); *In re New York City Asbestos Litigation*, 542 N.Y.S.2d 118, 121 (N.Y. Sup. Ct. 1989). But see, *Garner v. Santoro*, 865 F.2d 629 (5th Cir. 1989) where epoxy paint, purchased for its anticorrosive qualities, was considered military equipment and, therefore, included under the defense. In light of the *Boyle* dissent, *supra* note 17, and other circuit court opinions, the nonmilitary product exception seems erroneous. See e.g., *Garner*, 865 F.2d 629 (5th Cir. 1989); *Beaver Valley Power*, 883 F.2d 1210 (3d Cir. 1989), and *Nielsen v. Diamond Vogel Paint Co.*, 892 F.2d 1450, 1454 (9th Cir. 1990).

56. *Beaver Valley Power*, 883 F.2d at 1219.

57. 865 F.2d 1474 (5th Cir. 1989).

58. *Id.* at 1486. General Dynamics was tasked to produce working drawings for a submarine conversion, in response to a 339-page circular of requirements issued by the Navy. General Dynamics employees produced 71 pages of detailed working drawings, each of which was approved by a government employee. The actual construction work was done by the Navy. *Id.* at 1476-77.

59. No. 87-CV-1205, (N.D.N.Y. Mar. 28, 1990), 1990 U.S. Dist. LEXIS 3509.

60. *Id.* at LEXIS 3509, at 19.

61. *Id.* at LEXIS 3509, 18. The court noted that because the specifications offered by Boeing did not discuss the size of the allegedly defective equipment or its shape the specifications were not "detailed design drawings."

Trevino and *Deniston* contemplate a significant burden for the contractor to show it is immune from suit. But a case decided the same day and in the same circuit as *Trevino* imposes a lesser degree of review to constitute government approval. In *Smith v. Xerox*,⁶² the court held that the Army approved reasonably precise specifications when it specified the environmental conditions under which a rocket launcher should perform and approved the final drawings and specifications from the manufacturer.⁶³ The holding differs from that in *Trevino* because the procedural nature of the projects appears to be the same, *i.e.*, both contractors were given a set of requirements for the contractor to meet in producing a product and both contractors met those requirements. In addition, the voluminous specifications provided by the Navy in *Trevino* seem no more vague than the general environmental specifications provided by the Army in *Smith*. The court in *Smith* noted that *Boyle* required "only that the government approve reasonably precise specifications."⁶⁴ The clear implication is that the defendant's burden of proof in government contractor defense cases is not an onerous one, but need only establish that the Government has some discernable interest in the design process. Several other circuits side with the lower standard.⁶⁵

The *Trevino* court also noted another factor useful in attacking the Government's approval process. The use of an unqualified or incompetent engineer to review the design or work submitted by the contractor may be an indication that the Government was only "rubber-stamping" the product design. Such a rubber-stamp approval would not equate to the Government exercising its discretion.⁶⁶ The court noted, however, that use of an incompetent engineer to review a design would constitute approval of the design so long as the Government intended to use its discretion.

Occasionally the Government, because of lack of expertise or knowledge concerning the options available, will have to bring in a contractor to assist in the preparation of design specifications. Does this participation void the Government's exercise of its discretion as a matter of law? In *Zinck v. ITT Corp.*,⁶⁷ the court noted once more that so long as the Government approves reasonably precise specifications, the defense is available to the contractor.⁶⁸ *Zinck* involved the production of night vision goggles for Army helicopter pilots. After bringing in the contractor to evaluate the requirements for the goggles, the Government approved the specifications and retained sole authority to modify them. Under these circumstances, the Army retained enough authority for valid approval of the specifications.⁶⁹ Other courts noted that where the user of the product had long experience with the item and decided to continue using it, even where the contractor developed the design and there was no formal approval of specifications, approval of reasonably precise specifications was established.⁷⁰ Likewise, there does not have to be a continuous back and forth

62. 866 F.2d 135 (5th Cir. 1989).

63. *Id.* at 138.

64. *Id.*

65. See *Ramey v. Martin-Baker Aircraft Co., Ltd.*, 874 F.2d 946 (4th Cir. 1989), where the court held that the Government may approve a design either by continued use of the design over a period of time or by a review of the design that just consists of more than a mere rubber stamp; and *Harduvel*, 878 F.2d 1311, at 1320, where the court noted that approval of reasonably precise specifications is obtained where the contractor incorporates government performance specifications into a design and the Government then reviews and approves the design. For a well crafted factual and legal analysis of this issue, see *In re Aircraft Crash Litigation*, No. C-3__82__ 195 (S.D. Ohio, Aug. 21, 1990).

66. *Trevino*, 865 F.2d at 1486-87, n.12.

67. 690 F. Supp. 1331 (S.D.N.Y. 1988).

68. *Id.* at 1336.

69. *Id.* For a similar result involving night vision goggles prior to *Boyle*, see *Crossan*, 693 F. Supp. 528 (E.D. Mich. 1986).

70. *Ramey*, 874 F.2d at 950.

exchange of information and discussion between the Government and the contractor concerning a specific design deficiency to establish government approval of the overall design and validate the defense.⁷¹ Nor does the Government need to approve reasonably precise specifications for every component of a product for the defense to take effect. The Government must only approve the specifications for the overall product, such as an aircraft.⁷²

Other plaintiffs have attempted to show that because the Government purchased an item "off the shelf," there could not be an approval of the design by the Government. At least one court, however, stated that the relevant time for such an inquiry was not limited to the time the Government took delivery of the product, and that post-purchase design reviews by the Government could provide the basis for a valid assertion of the defense.⁷³

B. The Design versus Manufacture Conundrum

In an effort to get around the defense, some plaintiffs have used the second requirement of *Boyle*, which states that the product must be manufactured in accordance with reasonably precise specifications approved by the Government.⁷⁴ The defense does not apply to manufacturing defects.⁷⁵

Allegations of manufacturing defects are usually difficult to prove. The evidence of a manufacturing discrepancy is often destroyed in the incident giving rise to the tort action, leaving the plaintiff with nothing to examine. A typical case is *Harduvel v. General Dynamics Corp.*⁷⁶ where an F-16 fighter-bomber crashed, killing the plaintiff's husband. The plaintiff alleged that wire bundle chafing caused loss of electrical power to the aircraft's flight systems.⁷⁷ The aircraft was almost completely destroyed in the accident, forcing the plaintiff to examine intact aircraft in an attempt to determine the cause of the accident.⁷⁸ Unfortunately for the plaintiff's case, in analyzing the maintenance reports of other F-16s, her expert showed that many aircraft had a problem with wire chafing, and that the problem was not attributable solely to Harduvel's aircraft.⁷⁹ The court determined this product-wide defect to be "a problem inherent in the design of the all-electric F-16"⁸⁰ rather than a manufacturing defect. *Harduvel* also involved an attempt by the plaintiff to define a manufacturing defect in terms of state law. The case was brought in Florida, which allows an inference of manufacturing defect when a product is destroyed in an accident and the plaintiff presents evidence tending to disprove causes other than product defect.⁸¹

71. *Maguire v. Hughes Aircraft Corp.*, No. 87-4706, slip op. at 6 (D.N.J. Nov. 6, 1989), citing *Wilson v. Boeing Co.*, 655 F. Supp. 766, 773 (E.D. Pa. 1987).

72. *Niemann*, 721 F. Supp., at 1027; but see, *Deniston*, No. 87-CV-1205 (N.D.N.Y. Mar. 28, 1990) 1990 U.S. Dist. LEXIS 3509.

73. *Schwindt v. Cessna Aircraft Co.*, No. CV485-472 (S.D. Ga. Aug. 31, 1988), 1988 U.S. Dist. LEXIS 9886. *Schwindt* involved the crash of an Air Force O-2 observation aircraft purchased, unmodified, from the defendant. The court held that certain government actions regarding design review subsequent to the purchase could equate to approval required by *Boyle*.

74. *Boyle*, 487 U.S. at 512.

75. *McGonical v. Gearhart Industries, Inc.*, 851 F.2d 774 (5th Cir. 1988) and *Harduvel*, 878 F.2d 1311 (11th Cir. 1989).

76. 878 F.2d 1311 (11th Cir. 1989), cert. denied, —U.S.—, 110 S.Ct. 1479 (1990).

77. *Id.* at 1314.

78. *Id.*

79. *Id.* at 1318.

80. *Id.* See also *Zinck*, 690 F. Supp. at 1337, regarding the difficulty of proving a manufacturing defect when the product is destroyed in an accident.

81. *Harduvel*, 878 F.2d at 1317. See also *Worsham v. A.H. Robins Co.*, 734 F.2d 676 (11th Cir. 1984).

The court rejected application of a state law inference of manufacturing defect, noting that it would create a presumption that the defense is inapplicable, thereby, undermining an important federal interest.⁸²

Another means of showing a manufacturing, rather than a design, defect is by citing general performance requirements for a product and then alleging that because the product failed to perform as called for, there was a failure to manufacture the item to specifications. In *Kleemann v. McDonnell Douglas Corp.*,⁸³ a Navy pilot died when his F/A-18 aircraft crashed on landing, the landing gear failing to lock into position after extension.⁸⁴ His widow alleged that, because the design specifications for the aircraft called for landing gear able to withstand normal landing loads and for a landing gear failure not to result in uncontrollable aircraft movement, there was a failure by the defendant to manufacture the aircraft in accordance with government specifications.⁸⁵

The court, in response, stated an important principle: The design specifications for military (and presumably other types) hardware encompass much more than the original procurement specifications and include the engineering analysis developed during the actual production process.⁸⁶ The working drawings submitted by McDonnell Douglas in response to the Navy's general specifications, which were approved by the Navy, constituted the reasonably precise specifications required under the *Boyle* analysis.⁸⁷ The court noted the difference between "general qualitative requirements that represent little more than the hopes of participants that the project on which they are about to embark will turn out well" and detailed precise and qualitative specifications for manufacture of a particular product.⁸⁸ Holding contractors to general performance specifications would render the defense meaningless, in that no performance specifications approved by the Government would purposely allow a design that caused accidents.

Often design specifications call for a certain performance standard in terms of such criteria as mean time between failures or no failures for a certain percentage of the items. Such was the case in *Maguire v. Hughes Aircraft Corp.*⁸⁹ that involved the crash of an Army National Guard helicopter. The pilot alleged a manufacturing defect in an engine bearing that failed, causing the crash of the aircraft. The bearing was designed to specifications calling for a ten percent failure rate in all bearings within a specified time period. The bearing allegedly failed before the end of that time frame.⁹⁰ The court held the failure rate requirement to be a specification, rather than a piece of technical information as argued by the defendants. But the nature of the specification rendered meaningless any analysis of individual bearings, because the specification only required ninety percent of the bearings to reach the required number of hours. The specification for a ten percent failure rate "makes it impossible for the single failure of any one bearing to constitute nonconformity."⁹¹

82. *Harduvel*, 878 F.2d at 1317.

83. 890 F.2d 698 (4th Cir. 1989).

84. *Id.* at 700.

85. *Id.* at 702.

86. *Id.*

87. *Id.* The court also stated the continuous exchange of information between the Navy and the contractor during the landing gear design was "persuasive evidence" of product conformity to the Navy specifications, as well as extensive Navy involvement in subsequent design decisions concerning the landing gear up to the date of the accident in 1985.

88. *Id.* at 703, citing *Shaw v. Grumman Aerospace Corp.*, 778 F.2d at 745.

89. No. 87-4706 (D.N.J. Nov. 6, 1989).

90. *Id.* slip op. at 7. The specifications called for a failure rate of ten percent within 1870 hours. It appeared from the maintenance records that the engine failed after 711 hours, although the defendant argued the bearing actually was in service for some 2664 hours before failure.

91. *Id.* slip op. at 9.

C. Failure to Warn

Plaintiffs have also alleged a tort cause of action quite different from simple design or manufacturing defects. A number of cases deal with hazardous materials used in government products and the failure of contractors to warn about the dangers of exposure. This has proved a fruitful area of litigation, most notably because the courts seek to identify a conflict between state warning requirements and federal interests in determining whether there is a duty to follow state law warning requirements.⁹²

This technique is particularly noticeable in cases involving asbestos exposure. The court *In re Joint Eastern & Southern District Asbestos Litigation*,⁹³ a case involving Navy workers exposed to an asbestos-based cement, made several important rulings regarding a military contractor's duty to warn. The court noted first that *Boyle* applies to cases involving failure-to-warn torts as well as design defect cases, stating that the same type of conflict between federal and state interests can occur.⁹⁴ The court then held that before the defense applies there must be in the contract a warning requirement that conflicts significantly with state law requirements.⁹⁵ Where there is no federal interest, there is no conflict, and state law requirements may be safely imposed. The court also specifically rejected the defendant's claim that the third prong of *Boyle* implies a preemption of any state law duty to third parties, noting that the two duties serve completely different purposes.⁹⁶ The court reached a similar result in *In re Hawaii Federal Asbestos Cases*⁹⁷ where it found no federal interest in a government specification that did not call for or forbid any type of warnings regarding asbestos used in insulations. In *Dorse v. Eagle-Picher Industries, Inc.*,⁹⁸ the court again found no conflict between the requirements of state law to warn individuals of the nature of asbestos and the requirements of the government contract to produce cement with asbestos in it.⁹⁹ These holdings are at least facially inconsistent with two cases from other circuits. The court in *Niemann v. McDonnell Douglas Corp.*¹⁰⁰ also held the defense applicable in failure-to-warn cases. The decision addressed the plaintiff's claim of injury from asbestos exposure while working on Air Force aircraft, holding that the contractor's duty to warn the Government and its employees about the dangers of exposure was superseded by the Government's approval of the use of asbestos in the original design and the superior position of the Government regarding its knowledge

92. This type of case should not be confused with failure by the contractor adequately to warn the Government of danger from the product, under the third prong of *Boyle*. See *infra* text accompanying section IIID.

93. 897 F.2d 626 (2d Cir. 1990).

94. *Id.* at 629-30.

95. *Id.* at 630.

96. *Id.* at 632. The court stated that the warning requirement in *Boyle* was aimed at keeping the Government apprised of the nature of the equipment being bought, while the state duty to warn serves to put product users on notice to protect their own safety.

97. 715 F. Supp. 298 (D. Haw. 1988).

98. 898 F.2d 1487 (11th cir. 1990).

99. *Id.* at 591-92. The court took a slightly different approach from the New York and Hawaii cases in identifying a "two-pronged analysis" derived from the *Boyle* case. The first prong is that the case concern an area of uniquely federal interest; the second prong is whether there is a conflict between the federal policy and operation of state law. The result, however, was the same: no conflict, and no immunity for the contractor from state duty to warn requirements. Cf. *Aircraft Crash Litigation*, No. C-3-82-195 (S.D. Ohio, Aug. 21, 1990), slip op. at 93, where the court stated that the "significant conflict" requirements of *Boyle* is not a factual element of the defense.

100. 721 F. Supp. 1019 (S.D. Ill. 1989).

of the dangers of asbestos.¹⁰¹ Similarly, in *Smith v. Xerox*,¹⁰² the court noted the Government's superior position of knowledge regarding defects in an antitank rocket launcher trainer as validating contractor immunity under the third prong of *Boyle*.¹⁰³

One other case deserves mention in this group. *Nicholson v. United Technologies*¹⁰⁴ resulted from the explosion of a landing gear assembly on a helicopter. In analyzing the plaintiff's failure-to-warn cause of action, the court examined the Government's control over the maintenance and technical manuals for the helicopter (where warnings concerning the product would normally be placed) and found the contractor had virtually no input into the manuals without the Government's consent. The court also determined that the Government contributed the majority of expertise in making changes to the manual.¹⁰⁵ Accordingly, the court found a significant conflict between federal interest and state law. The failure-to-warn claim was subjected to the same three-prong analysis as that of an ordinary design defect, and the court found the defense applied to immunize the contractor.¹⁰⁶

Although the results in these cases are different, it seems clear that failure-to-warn cases are most logically analyzed under the criteria established in the *Dorse*, *Hawaii*, *New York Asbestos*, and *Nicholson* cases. The rationale for the defense in *Boyle* was to protect federal interests where they conflicted with state tort law. The three asbestos cases and *Nicholson* properly examine whether there is a conflict between the requirements of the federal contract and state law duty to warn of the hazards from certain items. Where the Government clearly asserted an interest in warnings to its employees, as in *Nicholson*, the defense is valid. Where the contract is silent on warnings, then state law can take effect with no harm to the *Boyle* standard. Normally a contractor will have a difficult time establishing both an identifiable federal interest or policy in the existence or methods of warning, and a significant conflict between that federal interest and the operation of state law.¹⁰⁷

D. Other Attempts to Avoid *Boyle*

Several cases involved attempts to show that the contractor failed to provide proper warnings to the Government, thereby losing immunity under the third prong of *Boyle*. *Zinck v. ITT Corp.*¹⁰⁸ held that because of the Army's responsibility for all field testing it had a superior basis of knowledge for any defects. *Smith v. Xerox* similarly held that because the Government receives and processes all accident reports, and engages in lengthy and continuing testing, it is difficult for a plaintiff to show contractor knowledge superior to that of the Government.¹⁰⁹ In *Harduvel v. General Dynamics Corp.*,¹¹⁰ the plaintiff's failure-to-warn claim alleged that the contractor failed to warn the Government about the seriousness of the design defect, which supposedly resulted in the failure of the aircraft's electrical system. The court held that the plaintiff, to carry

101. *Id.* at 1025-28. The court did not address the issue of conflict between the Government's requirements and state law requirements regarding duty to warn, a fact noted by the court in *Joint Eastern & Southern District Asbestos*, 897 F.2d, at 630, n.5.

102. 866 F.2d, 135 (5th Cir., 1989).

103. *Id.* at 139. Again, the court did not address the federal interest-state law conflict issue.

104. 697 F. Supp. (D. Conn. 1988).

105. *Id.* at 604.

106. *Id.* at 604-05.

107. *Garner*, 865 F.2d at 635-36.

108. 690 F. Supp. at 1337.

109. 866 F.2d at 139.

110. 878 F.2d 1311 (11th Cir. 1989), *cert. denied*, —U.S.—, 110 S.Ct. 1479 (1990).

her burden of showing superior contractor knowledge, had to demonstrate the contractor knew the danger was more serious than did the Government.¹¹¹

Other plaintiffs attempted to apply the concept of *res ipsa loquitur* to contractor design and manufacturing defects. The doctrine has failed, mainly because the plaintiff cannot show that the party eligible for suit (the contractor) had exclusive control over the defective product.¹¹² Attempts to apply other theories, such as strict liability, subcontractor liability, and breach of warranty also failed because the defense is not based on negligence theory but rather public policy.¹¹³ Finally, attempts to limit *Boyle* to military equipment generally failed.¹¹⁴

IV. NOTES FOR PRACTITIONERS

Several points become apparent from a review of the current cases involving the government contractor defense. First, the contractor and the government agency involved must be prepared to show compliance with the three elements of *Boyle*. Most of the work in preparing to prove government approval of specifications will involve assembling the contract bids and follow-on design work. When possible, the actual approving authority, be it the chief engineer, the program manager, or the design review official, should prepare to discuss not only what the Government wanted in terms of design, but the level of expertise among the government design approval team, and how dependent the approval officials were on the contractor's designers for purposes of contract review. Obviously, it does not help the viability of the defense if the government reviewers have little or no technical qualifications and must rely heavily on the contractor properly to analyze the specifications.¹¹⁵ Where possible, the Government should also provide a record of communications between the contractor and the Government, documenting the "give and take" in the design process that shows conscious government approval of every design suggestion and change. If the product involved is one purchased "off-the-shelf," the contractor must have a set of detailed specifications prepared for government approval, to document the government interest. If component parts are used, there should be a formal approval document signed by a government representative after the inclusion of the component into the ultimate product. From the above discussion, it is clear that the time to ensure compliance with *Boyle* is at the beginning of the design process.

After the accident causing injury, the Government must seek, as in other potential tort cases, to preserve the evidence of the product as much as possible, to preclude charges of lost evidence of manufacturing defect. The contractor should have the inspection records of the production lots available for review, to show that the product was properly checked before going to the field. And the Government should have all maintenance records for the product available to demonstrate that the equipment performed as designed over an extended period, to preclude charges of manufacturing defect.

The Government should assemble a record of all communications, including message traffic through associated commands and federal agencies, concerning accidents and warnings concerning the product in question. This reveals the relative

111. *Id.* at 1321.

112. *Smith v. Xerox*, 866 F.2d 135 (5th Cir. 1989) and *Zinck v. ITT Corp.*, 690 F. Supp. 13431 (S.D.N.Y. 1988).

113. See *supra*, text accompanying section I A, *Crossan*, 693 F. Supp. 528 (E.D. Mich. 1986) and *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989).

114. See *Garner*, 865 F.2d at 637.

115. This reliance would not take the form of a formal agreement, but rather a deference by the

position of the two parties regarding dangers or problems with the defective product.

In cases involving potentially hazardous materials, such as asbestos or dioxin, the contractor should attempt to arrange as much government review and control of technical manuals and warnings to employees as possible.

These actions will validate the federal interest present in the product, show the contractor properly manufactured the item, and properly advised the Government and other consumers concerning possible hazards. The more involved the Government in all aspects of the design and manufacturing process, the more likely the courts will find both a significant federal interest and the approval of reasonably precise specifications. Careful records-keeping will aid in defending against charges of manufacturing defects and failure to warn employees. And these steps will indirectly promote the public policy goals of the government contractor defense and ultimately provide the federal agency with a better product.

V. CONCLUSION

Like any new legal standard, the government contractor defense will be subject to revision as the federal courts shake out the nuances of the three-part *Boyle* test. As indicated in this article, the courts are already beginning to divide over how much federal involvement equals an exercise of government discretion and whether the defense has any real application to nonmilitary products. Several points appear clear now, however. The first is that contractors must begin to prepare for the defense early in the product acquisition process. Designs must be reviewed and approved by the Government in a meaningful and thorough manner. Second, the contractor should attempt to involve the Government in as much of the design and review process as possible, to include the nature of warnings and maintenance procedures and the inclusion of off-the-shelf items in the final product. Third, the policy rationales behind the adoption of the defense can provide fertile ground for defense attorneys faced with suits against government contracts.

The Supreme Court in *Boyle* fashioned a limited immunity for government contractors. That immunity was not a result of, as one commentator noted, the Court's belief that contractors were in need of limited protection and the Court had the power to grant such protection.¹¹⁶ Instead the defense is a "recognition of the incompatibility of modern products liability law and the exigencies of national defense"¹¹⁷ and legitimate federal interests.

approval authority in reviewing the design to the contractor's greater expertise and experience.

116. See Schwarz, *The Government Contractor Defense After Boyle*, TRIAL, 88-91, at 89 (Sept. 1988).

117. *Harduvel*, 878 F.2d at 1332.

Medical Care Recovery Claims: A Working Guide for Claims Officers

TIMOTHY J. MCGRATH

I. INTRODUCTION

The purpose of this article is to explain the workings and background of federal medical care recovery claims; it is intended to be practical in nature. The article is designed to proffer advice to the new claims officer on procedures to protect the Government's financial interest.

An Air Force claims officer typically is a young attorney who has had relatively little legal experience. Often the claims officer is new to the Air Force, and has had little prior contact with the military. In the midst of trying to become an officer and learning the customs and courtesies of the service, the claims officer may be thrown into a position where there is often little guidance, little corporate memory, and no close supervision. The new claims officer is expected to overcome those deficiencies, quickly master the intricacies of the job, and become a subject matter expert. The judge advocate who immediately garners a working knowledge of applicable statutes and case law is one who can attack the ever growing number of claims in the office.

A judge advocate who has the responsibility of collecting the monies owed to the Federal Government has a job that can be both personally and professionally rewarding. By protecting the taxpayers' interest and returning money to the U.S. Treasury, one can have a sense of pride and accomplishment as a steward of the public trust. The claims officer who pursues medical care recovery claims encounters a broad spectrum of issues involving insurance law, personal injury, contracts, workers compensation, and state and federal statutory and common law. By understanding and then appropriately applying the law, the claims officer can establish a successful recovery program.

II. BACKGROUND

The Department of Defense (DOD) spends millions of dollars every year providing medical benefits to eligible recipients¹ including active duty military personnel, retirees, and dependents. Many of those who receive care do so because of the negligence of a third party. The vast majority of medical care recovery claims involve automobile accidents.

Congress enacted the Federal Medical Care Recovery Act (FMCRA)² in 1963 as a way of recovering medical expenses from third party tortfeasors who injure members of the Armed Forces.³ The FMCRA came about after the Government's

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1. 10 U.S.C. §§ 1071-1104 (1986).

2. 42 U.S.C. §§ 2651-53 (1962).

3. As was stated in the Report of The Senate Judiciary Committee, "The purpose of the proposed

authority, to collect medical expenses was challenged in *United States v. Standard Oil*.⁴ The recoupment of funds was designed to prevent an economic windfall by the tortfeasor who would otherwise escape liability for payment of those medical expenses.

III. THEORIES OF RECOVERY

When pursuing medical care recovery claims, it is imperative that there be a legal basis for the assertion. Ideally the base legal office will have a handy reference guide that will list and synopsise the important federal and state law for the local area. The claims officer should ensure the reference material is current and periodically update it.

If the claims jurisdiction encompasses more than one state, make certain there is reference material from each of the states. A diversity of opinion exists among the federal courts concerning the Government's recovery rights and the claims officer should be familiar with the holdings in the applicable area.

Before asserting a claim, analyze the facts to determine whether a course of action exists. If it does, then determine whether the theory of recovery will be based upon tort or contract. An analysis of the law is critical in determining how to maximize a recovery.

The first analysis is to see whether a tort exists under state law. Review the facts and circumstances to determine whether there are any defenses to the alleged negligence. Determine the status of the injured parties in motor vehicle accidents and the applicability of guest statutes. In *United States v. Oliverira*,⁵ the court held that the South Dakota guest statute barred recovery of a passenger's medical expenses because there was a lack of willful or wanton negligence on the part of the driver. Other courts have determined the state guest statutes did not bar recovery by the United States.⁶

Intrafamily immunity may be an issue to consider in determining whether there is tortious conduct. In *United States v. Haynes*,⁷ the First Circuit Court of Appeals held the United States could recover medical expenses on behalf of a woman who was injured by her husband. The court stated that "the [Louisiana] state procedure . . . does not prevent the government from maintaining a suit against the third party tortfeasor just because he is the husband rather than a stranger to the marriage contract." In *United States v. Moore*,⁸ the court held that the Maine interspousal immunity law did not bar the United States from recovering from a negligent wife for medical expenses provided to her husband. The court was "[of] the opinion that the Medical Care Recovery Act confers on the United States an independent right of recovery which is unimpaired by the vagaries of state family immunity laws; otherwise stated, enforcement of the Act is free of the impact of right-to-sue limitations imposed by a state's family immunity laws."⁹

legislation is to provide for the recovery by the United States from negligent third persons for the cost of hospital, medical, surgical, or dental care and treatment furnished by the United States, pursuant to authority or requirement of law, to a person who is injured or suffers a disease under circumstances creating a tort liability upon such third person." S. REP. NO. 1945, 87th Cong., 2d Sess. 2, (1962) reprinted in 1962 U.S. CODE CONG. & ADMIN. NEWS 2637.

4. 332 U.S. 301 (1947).

5. 489 F. Supp. 981 (D.S.D. 1980).

6. See *United States v. Forte*, 427 F. Supp. 340 (D. Del. 1977). The court held the FMCRA was not subject to the provisions of the Delaware automobile guest statute when a defendant sought to use the statute as an affirmative bar to U.S. recovery; *Government Employees Ins. Co. v. Bate*, 414 F. Supp. 658 (E.D. Ark. 1975). The Arkansas guest statute was not a bar to recovery by the United States.

7. 445 F.2d 907 (1st Cir. 1971).

8. 469 F.2d 788 (3d Cir. 1972), cert. denied, 411 U.S. 905 (1973).

9. *Id.* at 790.

A tort victim's own contributory negligence may be a defense to an action by the United States against a tortfeasor under the FMCRA.¹⁰ The negligence of the United States barred its recovery against another tortfeasor for injuries to a soldier in *California Pacific Utilities v. United States*.¹¹ There, a soldier was seriously injured when his radio antenna contacted some electric utility lines. The United States was negligent in failing to warn him of the damages to the power lines, and its suit for reimbursement of medical expenses from the utility company failed. The United States was also barred from recovery in another case due to the negligence of Coast Guard personnel who contributed to causing the injuries.¹² The United States has, however, been able to recover in other cases where issues of contributory negligence have been raised.¹³

Having ascertained that tort liability exists and no other substantive defenses exist, ensure the claim is not subject to a statute of limitations problem. The claim of the United States is not subject to a state statute of limitations applicable to personal injury matters¹⁴ but may be subject to state procedural filing requirements as a condition precedent for recovery.¹⁵ Suit by the United States should generally be filed within three years of the date of injury.¹⁶

In addition to the tort theory of recovery, the United States may recover from an insurer by asserting a claim as a third party beneficiary of an insurance contract. Claims may be asserted under the uninsured motorist coverage and medical payments portions of insurance policies. Success or failure in asserting third party beneficiary status often hinges on the express contract language, state insurance laws, and judicial interpretation. It is imperative to be familiar with the law in the local jurisdiction.

Uninsured motorist provisions are designed to protect an insured from the negligence of a tortfeasor who is not insured. A claim for damage would be asserted by the injured party against his own insurer. The United States has been held to be a proper claimant under uninsured motorist coverage.¹⁷ Medical payments provisions are designed to pay for medical expenses related to injuries sustained in an insured's vehicle. The United States has been held to a proper claimant under this type of provision.¹⁸

Perhaps the most troublesome roadblock to recovery today is the problem encountered in no-fault insurance states. No-fault insurance is a creature of legislation that modifies the concept of automobile tort liability. By not assigning fault to any party in an accident, each party looks to his own insurer for compensation for personal injury and property damage. The specific language of a state's no-fault law must be reviewed to determine to what extent tort liability has been abolished or modified. The differences among various no-fault statutes are considerable.

Efforts by the United States to pursue FMCRA claims in no-fault jurisdictions have not been overly successful. The courts have held that, because the FMCRA

10. *United States v. Greene*, 266 F. Supp. 976, 979 (N.D. Ill. 1967).

11. 194 Ct. Cl. 703 (1971).

12. *Nikiforow v. Rittenhouse*, 319 F. Supp. 697 (E.D. Pa. 1970).

13. See *United States v. Housing Authority of Bremerton*, 415 F.2d 239 (9th Cir. 1969); *Maddux v. Cox*, 382 F.2d 119 (8th Cir. 1967).

14. *United States v. Fort Benning Rifle and Pistol Club*, 387 F.2d 884 (5th Cir. 1967).

15. *United States v. Sturdivant*, 529 F.2d 673 (3d Cir. 1976), and *United States v. Hartford Accident and Indemnity Co.*, 320 F. Supp. 648 (E.D. Cal. 1970), *aff'd*, 460 F.2d 17 (9th Cir. 1972), *cert. denied*, 409 U.S. 979 (1972).

16. 28 U.S.C. §§ 2415-16 (1966).

17. *United States v. Government Employees Ins. Co.*, 440 F.2d 1338 (5th Cir. 1971); *Government Employees Ins. Co.* 376 F.2d 836 (4th Cir. 1967).

18. See *United States v. Auto Club Ins. Co.*, 552 F.2d 1 (5th Cir. 1975); *United States v. California State Auto Association*, 385 F. Supp. 669 (E.D. Cal. 1974), *aff'd*, 530 F.2d, 850 (9th Cir. 1976); *United States v. Government Employees Ins. Co.*, 461 F.2d 59 (4th Cir. 1972); *United States v. State Farm*,

requires third party tort liability for a cause of action, and no-fault abrogates tort liability, the claim of the United States must logically fail.¹⁹

The federal courts have certified questions to the state supreme courts when an issue of the state's interpretation of its no-fault law arose.²⁰ In *United States v. Allstate*,²¹ the court held that recovery under FMCRA was not possible because the Michigan no-fault statute abolished the traditional concept of tort liability that the FMCRA requires. The court, in its analysis, also ruled that the United States was not an insured under the policy, was not a third party beneficiary of the policy, and was not entitled to recover as an assignee of the injured party's cause of action.²² In *Heusle v. National Mutual Insurance Co.*,²³ the court determined the United States had no federal statutory basis to assert a claim as a third party beneficiary under the Pennsylvania no-fault law.

If recovery hinges on tort liability in a no-fault jurisdiction, collection efforts will be an uphill battle. But by knowing the law and any of its quirks and limitations, there may still be ways to collect.

Another, often overlooked, source of recovery is from state workers compensation benefits. Workers compensation benefits are generally available to compensate an employee for on-the-job related injuries and lost wages.

If an injured worker, who is also an eligible recipient of military medical care, seeks treatment at government expense, the United States may be entitled to recover the cost of medical care provided for that job-related injury. It is imperative to comply with any state statutory or procedural requirements when asserting a medical care recovery claim under a workers compensation program.

The Air Force currently oversees a DOD program in California whereby a private firm has been contracted to identify and collect workers compensation claims on behalf of the military services. After an initial test period, the program proved successful, and a multi-year contract was awarded.²⁴ The contractor works on a contingency fee basis, and receives a percentage of all monies collected.

Claims officers should become familiar with the state workers compensation systems in their jurisdictions and should develop a method of identifying and pursuing collections.

IV. PROCESSING CLAIMS

Once the claims officer has become familiar with the various bases of recovery, he must search for potential claims to assert. After claims have been identified, quick action and aggressive follow-up will ensure timely collections.

Although a majority of potential cases are forwarded to the base hospital for review, that source should not be exclusive. A creative and aggressive claims officer will develop alternative sources throughout the base. By establishing a good working relationship with key personnel (safety officials, first sergeants, transportation officers, etc.) and by explaining the need to know about any accidents, the potential for identifying cases is greatly enhanced. The more an individual knows about the Government's right to collect, the more likely he will be to report potential claims. Education

455 F.2d 789 (10th Cir. 1972).

19. *United States v. Dairyland Ins. Co.*, 674 F.2d 750 (8th Cir. 1982); *Heusle v. National Mutual Ins. Co.*, 628 F.2d 833 (3d Cir. 1980).

20. *United States v. Traveler's Indemnity*, 748 F.2d 1504 (11th Cir. 1984).

21. 573 F. Supp. 142 (W.D. Mich. 1983).

22. *Id.* at 146.

23. 628 F.2d 833, 838 (3d Cir. 1980).

24. Contract # F49642-89-A0005.

and public awareness will lead to the discovery of previously untapped sources.

After identification of a potential claim, the next step is to gather facts and information. Typically this is done by sending a questionnaire to the injured party requesting details about the incident. Information concerning the tortfeasor and his insurer is required if there is to be a successful collection. A notice of claim should then be sent to the tortfeasor advising him of the Government's intent to be reimbursed for medical expenses. The amount of the government claim is determined by applying the Office of Management and Budget published rates²⁵ for care in military medical treatment facilities, or by the amount of actual payment to a private health care provider. The private health care provider may be reimbursed directly by CHAMPUS or by a military hospital accounting office in the case of active duty personnel.

After a claim is asserted, the demand should be aggressively pursued to ensure prompt payment by the tortfeasor or his insurance company. If the injured party is represented by private counsel, the claims officer should request the attorney also represent the interest of the Air Force.²⁶ Private attorneys are often reluctant to sign a representation agreement, when there are insufficient insurance proceeds available to compensate both the injured party and the United States. The claims officer should understand a potential conflict of interest and use his advocacy skills to persuade the private attorney to reconsider. A cooperative private attorney is more likely to be able to persuade a settlement authority of the necessity for waiver or compromise than is an uncooperative attorney.

Although the injured party's attorney may not receive a fee from the Government for his representation,²⁷ the arrangement can be mutually beneficial. The Government obviously benefits from the attorney's representation in that there is no cost involved and the claim need not be litigated by the U.S. Attorney or the Department of Justice (DOJ). The private attorney also benefits by controlling the posture of any settlement negotiations without having a government representative sitting at the bargaining table. The private attorney may also receive easier access to military witnesses and medical records and evaluations. Furthermore, the attorney can use the amount of the Government's medical expenses as an item of special damages to increase any possible settlement.

Practically speaking, a local U.S. Attorney cannot litigate small, routine medical care recovery claims due to resource and manpower constraints. The most viable option, therefore, is to encourage the injured party's counsel to represent the United States.

If representation cannot be secured and if it appears the interest of the Government will go unprotected, cases may be referred to the U.S. Attorney or the DOJ with approval of the Claims and Tort Litigations Staff, Office of The Judge Advocate General (HQ USAF/JACC). The United States may intervene in a state court action or file directly against the tortfeasor in federal district court. If the local U.S. Attorney will accept the case, the base legal office should assist in every possible way to ensure a successful prosecution of the claim. The claims officer should avail himself of the opportunity to build a professional working relationship with the U.S. Attorney's office by providing timely responses to requests for information, witnesses,

25. The OMB publishes rates annually in the Federal Register. Rates currently in effect are \$554 per inpatient day, \$67 per outpatient visit and \$2042 for care at Brooke Army Hospital Burn Center. The rates are found at 55 FED. REG. 949.

26. *Conley v. Maattala*, 303 F. Supp. 484 (D.N.H. 1969); *Palmer v. Sterling Drugs*, 343 F. Supp. 692 (C.D. Pa. 1972).

27. 5 U.S.C. § 3106 (1966).

litigation reports, etc. Once credibility and reputation have been established, future requests for litigation assistance will often be approved. Remember, affirmative claims are not the highest priority for a busy U.S. Attorney. If everything is done to make his job easier, a positive response is more likely in the future. Files that are forwarded must be complete, accurate, and contain an analysis of the law and facts. Appropriate litigation documents such as pleadings, interrogatories, etc., should be provided when requested. It is not enough for a claims officer merely to forward a file. By carefully following up, the officer will be kept abreast of any developments and can ensure the Air Force position is known throughout settlement negotiations and trial.

V. WAIVER/COMPROMISE

In an ideal personal injury action, there will be sufficient assets to compensate the injured party for his damages, pay attorney's fees, and pay the United States for the cost of its medical care. Unfortunately the perfect situation rarely exists. In a motor vehicle accident with serious injuries, insurance proceeds may not be adequate to satisfy all the parties, including the United States.

When that occurs, the injured party's attorney may ask for a waiver or compromise of the Government's claim. By definition, a waiver is a total forbearance of the claim, while in a compromise the United States accepts some lesser amount than was claimed.

When considering whether to waive the Government's interest,²⁸ the case must be evaluated to determine its realistic value. Bear in mind the private attorney usually has a financial stake in persuading the claims officer to waive the Government's interest. While it may be difficult to assign a dollar value to a personal injury, there are various sources available to assist in independently evaluating the situation. The Personal Injury Valuation Handbook, which is available at many base legal offices, offers a starting point. State bar associations and plaintiff's bar publish valuation guides concentrating on local geographic areas. In complex injury cases, consult other local attorneys for their opinions. Excellent sources are military reservists who deal in personal injury cases, and assistant U.S. Attorneys. As the claims officer becomes more experienced, he will be better able to evaluate damages. The knowledge gained in medical care recovery claims will aid in evaluating liability and damages in all Federal Tort Claims Act cases.

After ascertaining the value of the case, compare that with the amount of insurance proceeds or other assets available to the injured party. Consider the extent of injuries and degree of permanency of disability. If the injured party is permanently disabled or disfigured, the claims officer may be more likely to recommend waiver than in a case where injuries are slight or transitory. The injured party's attorney should put the request in writing, detailing the specific bases and justifications for the waiver. Waiver request are viewed favorably when the private attorney has been forthright with information, deals in a professional manner, and agrees to reduce his fee to benefit his client. When an attorney cannot or will not justify the reasons for a requested waiver, the case should be carefully scrutinized.

The United States should be as favorably situated as any other lienholder. Do not waive the Government's interest if a private hospital or other health care providers are to receive full payment for any unpaid medical expenses. In that situation it

28. See Air Force Reg. (AFR) 112-1, para. 15-10 for a list of factors to be considered in determining whether a claim should be compromised or waived.

would be appropriate to suggest a waiver of all outstanding bills by private health care providers as a condition of the Government's waiver. Alternatively, all parties could negotiate a proportional distribution of funds. In that way the Government would receive the same relative treatment as any other provider.

A compromise request should be approached similarly. Evaluate the value of the case vis-à-vis settlement proceeds and determine what would be an appropriate payment to the United States. Always attempt to negotiate the highest possible recovery consistent with the facts and circumstances. Bear in mind, however, absent the work of the injured party's counsel there may not have been a recovery.

Waivers and compromises should be used judiciously and only in appropriate circumstances. They are available to benefit an injured party and are not designed to enrich a private attorney at the expense of the United States.

Waiver or compromise requests in amounts above the settlement authority's jurisdiction should be referred to HQ USAF/JACC.²⁹ If the claim has been fully evaluated by the base claims officer, it is possible to obtain telephonic approval for the waiver/compromise. Telephonic procedures have been used at HQ USAF/JACC, providing for more timely responses. When requesting a telephonic approval, ensure all facts are readily available, particularly the nature and extent of injury, amount of proposed settlement, and the amount of the requested waiver/compromise.

Claims over \$40,000 must be referred to the DOJ for approval of any waiver/compromise.³⁰ HQ USAF/JACC handles the referral and coordination with DOJ.

VI. CONCLUSIONS

In these times of fiscal austerity, Congress is increasingly interested in efforts to hold down spending and to increase recovery of funds wherever possible.³¹ The General Accounting Office (GAO) has been tasked to evaluate the military services' affirmative claims programs.³²

The audit of the services' medical care recovery program provided an in-depth analysis of the workings and problems facing recovery efforts. The GAO report, (which had not yet been released at the time this article was written) is expected to focus on a number of deficiencies in the program. First and foremost is a failure adequately to identify potential claims. This often is a function of personnel constraints as well as a lack of command emphasis on the program. The report is expected to highlight the problems associated with the tort liability requirement of the FMCRA and problems encountered in no-fault insurance states.

The Congress, if it wants greatly to improve the efficiency of medical care recovery efforts by government agencies, must revise the FMCRA. It can do so by eliminating the third party tort liability requirement and by adopting language barring an insurer from excluding the Federal Government as a covered provider of medical benefits. Legislation has already been enacted that allows collection from third party payers for reasonable inpatient hospital expenses, and specifically does away with any provision that acts to exclude the United States as a provider.³³

29. AFR 112-1, para. 15-3.

30. 28 C.F.R. § 43.3.

31. See GAO Report #NSIAD 89-67 Household Goods: Evaluation of Department of Defense Claims Payment and Recovery Activities (Feb. 1989).

32. The GAO, at the request of the Chairman of the Subcommittee on Readiness, House Committee on Armed Services was asked to examine and evaluate the systems used by the Army, Navy and Air Force in recovering medical care costs from liable third parties. The GAO conducted a review from July 1988 to July 1989, visiting thirteen military medical facilities, Office of CHAMPUS, two CHAMPUS fiscal intermediaries and thirteen military legal offices.

33. 10 U.S.C. § 1095 (1986).

Until the FMCRA is changed, and the same standard is applied across all judicial districts, the United States will never have a consistent vital medical care recovery program. It is solely due to the dedication and professionalism of base claims officers and paralegals that the program is as successful as it is. By eliminating some of the roadblocks that bar recovery and by allocating additional resources, collection rates will soar. In the interim, each base must strive to improve its program by ferreting out new cases, following up aggressively, and conducting skillful negotiations, leading to ultimate collection.

Judge advocates tasked with the responsibility of collecting medical care recovery claims face continual challenges. It is an opportunity to work with a wide spectrum of the law in a practice that is often difficult, often thankless, and never-ending. Collection efforts rarely attract headlines, but they are an extremely important function of fiscal responsibility.

By being aggressive, innovative, and by developing excellent advocacy skills, a claims officer can find and collect large dollar claims. A successful recovery attorney is one who enjoys a challenge and who can accomplish things others say cannot be done.

The Borrowed Servant Defense and the Federal Tort Claims Act: Defending Physicians in Training

MAJOR SHERRI W. JOHNSON, USAF
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This article will discuss the borrowed servant doctrine as it pertains to medical personnel working for the Department of Defense (DOD). Analysis of this subject must consider the unique features of the Federal Tort Claims Act (FTCA),¹ as amended by the Federal Employees Liability Reform and Tort Compensation Act of 1988,² and the Gonzalez Act.³

In Air Force practice, we have most often encountered this troublesome issue when Air Force physicians and other medical personnel participate in civilian training programs, including residencies and fellowships. These programs include Armed Forces Institute of Technology (AFIT) sponsored and local programs in which a military medical treatment facility (MTF) enters into an affiliation agreement with a university or civilian medical facility through a memorandum of understanding (MOU). The converse of this situation arises when local universities or civilian medical facilities send their students to Air Force MTFs for training. In either case, the analysis is much the same.

Consideration of this subject must begin with the statutory framework within which Air Force medical personnel are protected from suit for alleged acts of medical malpractice. The FTCA states:

The head of each Federal agency. . . may consider, ascertain, adjust, determine, compromise and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred . . .⁴

The Gonzalez Act immunizes medical personnel from both suit for alleged negligent acts and from liability for injuries, depending upon the section of the law under which individual falls. In pertinent part, the Act states:

(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel . . . in the performance of medical, dental, or related health care functions . . . while

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1. 28 U.S.C. §§ 1346(b), 1346(c), 2401(b), 2402, 2671, 2672, 2674-2680.

2. 28 U.S.C. § 2761.

3. 10 U.S.C. § 1089.

4. 28 U.S.C. § 2672.

acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, nurse, pharmacist, or paramedical or other supporting personnel . . . whose act or omission gave rise to such action or proceeding.⁵

Later this statute provides:

(f) The head of the agency concerned may to the extent the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions . . . while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.⁶

Until recently, many federal practitioners believed that medical personnel were absolutely immune from suit under the provisions of 10 U.S.C. § 1089(a). The legislative history supported this broad protection.⁷ Previously, the Department of Justice, through the Assistant U.S. Attorneys responsible for the defense of such cases, sought removal of suits against DOD medical personnel to federal district courts. Then, the Assistant would move to substitute the United States for the named physician. If appropriate, the Assistant would assert the borrowed servant defense, consistent with local state law. But after the *Afonso* case,⁸ this strategy was no longer valid in some states.

Complete consideration of federal immunity must include the relevance of the Federal Employees Liability Reform and Tort Compensation Act of 1988⁹ to the question of whether Air Force medical personnel are employees within the meaning of the FTCA and the Gonzalez Act when they are detailed for service in a civilian residency, fellowship, or training program. Arguably, this amendment to the FTCA does provide medical personnel additional protection. The *Westfall* legislation¹⁰ provides the subject of a lawsuit with additional protection that may be broader than the protection under 10 U.S.C. § 1089. Also, the defendant employee has the opportunity to challenge any failure to certify scope of employment by the Department of Justice.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for the purposes of removal.

(2) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such

5. 10 U.S.C. § 1089(a) (emphasis added).

6. 10 U.S.C. § 1089(f).

7. 1976 U.S. CODE CONG. & ADMIN. NEWS 4443.

8. 587 F. Supp. 1342 (D. Mass. 1984).

9. 10 U.S.C. 2679.

10. *Id.* (So named for *Westfall v. Erwin*, 484 U.S. 292 (1988)).

certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States . . . and the United States shall be substituted as a party defendant.¹¹

The borrowed or loaned servant defense purports to shift vicarious liability from the master of a negligent servant to the borrowing master. Principles of agency apply to determine whether the employer will be liable for the acts or omissions of an employee. As defined in the Restatement (Second) of Agency, "[a] servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."¹²

The FTCA states that members of the armed services are "employees of the government" for the purposes of the Act. Is the relationship between a military member and the United States ever merely that of an employer-employee? Certainly military members are not permitted to quit with or without notice. Failure to obey an employer's orders may result in termination of employment, but in the military this action may carry with it a federal court conviction. To say that a military member is an employee is akin to describing an elephant as an animal with big ears.

The Restatement (Second) of Agency and the case law support the proposition that an employee may be permitted by his employer to become the servant of another in performing duties. "A servant directed or permitted by his master to perform services for another may become the servant of such other in performing services. He may become the other's servant as to some acts and not as to others."¹³

The analysis of whether a military physician is the borrowed servant of another is complicated. Can a military member ever be considered as a mere employee, even when he is acting in a purely civilian capacity, such as providing medical care in a routine manner in peacetime at a civilian medical facility?

Setting aside for the moment the issue of the special relationship between an Air Force member and the Air Force, consider whether a hospital is liable for the negligent acts of its interns or residents.

A resident is a licensed physician who pursues medical studies under the direction of the hospital staff and is paid a salary by the hospital, for the performance of certain patient care duties. A graduate medical trainee, or intern, is usually unlicensed and is employed by the hospital on a salaried basis to perform services while obtaining the experience necessary for license. Generally, residents and graduate medical trainees are considered employees, rather than independent contractors, because they are salaried by the hospital and generally do not have private patients.¹⁴

Thus, the general rule is that the hospital will be vicariously liable for the acts or omissions of its residents simply because they are employees of the hospital.¹⁵ But what if the resident is under the supervision and control of an independent physician, who is a specialist, when the alleged act of negligence occurs? Is the hospital or the independent physician liable?

Commonly, the other area that has resulted in litigation addressing this issue is the activity in the operating room. The question of the responsibility and liability for nursing errors is frequently complicated by the issue of whose employee is the nurse. Under the "captain of the ship" doctrine, the surgeon is responsible for the acts or omissions of anyone in the operating room, on the theory that the surgeon is in

11. 28 U.S.C. § 2761(d)(1),(d)(2).

12. RESTATEMENT (SECOND) OF AGENCY 20 (1957).

13. RESTATEMENT (SECOND) OF AGENCY 227 (1957).

14. IIB HOSPITAL LAW MANUAL 71 (Health Law Center: Asper Systems Corp. 1989).

15. *Id.* at 60.

charge of the "crew" of the operating room.¹⁶ While this analysis is still valid in some jurisdictions, in others the analysis is more refined. If an operating room nurse fails to take a proper count of the lap sponges, is this the responsibility of the surgeon? The nurse might not be considered the borrowed servant of the surgeon, but rather the employee of the hospital. Likewise, nurse anesthetists may remain the employees of the hospital when they provide anesthesia in an operation. The surgeon has no control over the administration of anesthesia. The anesthetist is a team member rather than the captain's crew member.¹⁷ The theory of the court was that because of the special training of a nurse anesthetist and her independence of action, she was not assisting the surgeon and was not under the control of the surgeon. Other cases have sought to divide the functions of the nurse to differentiate administrative functions from others that are within the direct control of the surgeon.¹⁸

If an Air Force resident is assigned to Merciless Hospital and he is under the supervision of a surgeon who has staff privileges but is not an employee of the training hospital, who is liable for the resident's negligence? Is it the hospital where he is receiving his training or is it the physician who is responsible for operating room conduct? Can it be the Air Force - his employer?

One of the important elements of the relationship between the hospital and the trainee is the employer-employee relationship. With active duty residents and interns, that element is always absent. Active duty persons are always members of the military and are not salaried by the hospital in which they receive their training. Yet, in their day-to-day training, they are under the professional supervision and control of the medical facility providing the training.

The Supreme Court has held that the question of who is an "employee of the government" within the meaning of the FTCA is a matter of federal law.¹⁹ The FTCA, as amended, clearly states that military members are "employees of the federal government." Can that status ever change when military members receive training, pursuant to orders, in a civilian facility? Can a resident be both a federal employee and the borrowed servant of a civilian facility? No case has held that a military physician in a civilian residency training program serves two masters, but conceptually, it is possible.²⁰

The Army Litigation Division recently addressed this issue, and their analysis bears repeating. With their permission, the following is an adaptation of part of their opinion, concerning the relationship between the Federal Government and its employees.

National Guard technicians and guardsmen performing duty under title 32 U.S.C. are clear examples of individuals whom Congress has declared to be employees of the Government for purposes of the FTCA without regard to the right of the Government to control the details of their daily performance of duty. The Court, in *Maryland v. United States*,²¹ held that military members of the National Guard, when not in active federal service, and civilian caretakers were both employees of the states and not employees of the Federal Government under the FTCA. The lack of federal control over the daily activities of these individuals figured prominently in the Court's decision.²² But without altering the essentials of the National Guard civilian caretaker program or diminishing the state's control over the caretaker's

16. Lousell & Williams, Medical Malpractice Fla. App. 2d para. 16A-8.

17. Fortson v. McNamara, 508 So.2d 35 (Fla. App. 2 Dist. 1987).

18. Ross v. Chatham County Hospital Authority, 367 S.E. 2d 793 (Ga. 1988).

19. Logue v. United States, 412 U.S. 512 (1973).

20. RESTATEMENT (SECOND) OF AGENCY 226 (1957).

21. Maryland v. United States, 381 U.S. 41 (1955).

22. *Id.* at 48-53.

performance of duty, Congress legislatively overruled *Maryland* and declared civilian caretakers, now called technicians, employees of the Government.²³ Congress did essentially the same thing with military members of the National Guard. Despite warnings by the Department of Justice that guardsmen performing federally funded training did not meet the right-to-control test and that declaring guardsmen employees of the Government would expose the United States to liability for actions of individuals over whom the Federal Government exercised little or no control, Congress amended the FTCA in 1981 to include guardsmen within the definition of "employee of the government."²⁴ Thus, in determining whether a guardsman is a federal employee within the meaning of the FTCA, a court need only determine that at the time of the incident giving rise to liability the tortfeasor was engaged in "training or duty under section 316, 502, 503, 504, or 505 of title 32."²⁵

As with guardsmen, the employment status of member of the regular military components is determined by the language of the statute without resort to the right-to-control test developed by the Supreme Court. The case of *Bellview v. United States*,²⁶ illustrates the application of this principle. The plaintiff sued the United States for injuries sustained in an automobile accident with an Air Force officer assigned to teach ROTC at St. Michael's College in Vermont. The United States moved for summary judgment and argued that the officer, Lt. Colonel Kingston, was a member of the college faculty and was not an employee of the Government at the time of the accident. The court rejected the Government's position and found that the officer was an employee of the Government:

Lt. Col. Kingston was an officer on active duty with the United States Air Force. He was ordered to duty at St. Michael's College. He was subject at any moment to be reassigned by the United States Air Force. His main source of livelihood comes from his salary as a Lieutenant Colonel, United States Air Force. I find he was an employee of the United States within the meaning of the Federal Tort Claims Act.²⁷

Lt. Colonel Kingston's status as a member of the military brought him within the FTCA's definition of an employee of the Government. The degree of supervision and control exercised by the college over his activities was irrelevant.²⁸ When the alleged tortfeasor is not a member of the military or otherwise clearly within the 28 U.S.C. § 2671 definition of employee, the courts must apply the federal right-to-control test to determine whether a master-servant relationship exists between the individual and the Government. The Fifth Circuit case of *Cavazos v. United States*,²⁹ is instructive. The plaintiff, a high school student enrolled in the Army Junior Reserve Officer Training Corps (JROTC) program, sued the United States for injuries he sustained due to the alleged negligence of the JROTC instructors in conducting their activities. The United States argued that the JROTC instructors, who were retired military personnel hired by the school and certified by the Army to teach, were employees of the school district and not the Government. The court noted that 28 U.S.C. 2671 defined "employee of the government" as including members of the military, but found that the instructors were civilians:

23. 709 National Guard Technicians Act of 1968, Pub. L. No. 90-486, 82 Stat. 755.

24. Pub. L. No. 97-124, 95 Stat. 1666 (1981).

25. 28 U.S.C. § 2671.

26. 122 F. Supp. 97 (D. Vt. 1954).

27. *Id.* at 98.

28. *Accord*, *LaBombard v. United States*, 122 F. Supp. 294 (D. Vt. 1954).

29. 776 F.2d 1263 (5th Cir. 1985).

Major Ervin and Sergeants Carter and Burris were not members of the military or naval forces of the United States at the time of the Cavazos accident. They were retired military personnel; they were civilians Since JROTC instructors were not members of the military or naval forces, Federal Tort Claims Act liability can only attach if they were civilian employees of the federal government. [T]o be civilian employees of the Army the Hanna High JROTC instructors had to be under the daily, detailed control and supervision of the Army.³⁰

The court then examined the degree of control exercised by the Army over the JROTC instructors and found it insufficient to bring them within the FTCA's definition of "employee of the government." Implicit in the court's analysis is the fact that military status determines whether one is a member of the military forces, and thus an employee of the Government under the FTCA, and that the "*Logue-Orleans* daily-detailed-control test" determines whether one is a civilian employee of the Government.³¹ Furthermore, if Congress can statutorily exclude individuals from section 2671's definition of "employee of the government," it can also statutorily include individuals.

Even if the right-to-control test were applied to determine whether a person was an "employee of the government," the unique status of a military and his relationship to the sovereign is such that the test will be satisfied in virtually every instance where the member is performing duties pursuant to official orders. Along with military status comes subjection to the Uniform Code of Military Justice.³² Obviously, the right to control an individual in the performance of assigned duties is at its maximum when criminal penalties may be imposed for dereliction in the performance of those duties.³³

Of the cases on point with military physicians in training at civilian hospitals, several generated considerable controversy. The most important of these are *Green v. United States*³⁴ and *Afonso v. City of Boston*.³⁵ The results are in conflict.

In *Green*, the Government was sued because a military physician, Dr. William Stanford, was involved in a tragic series of errors that led to Mrs. Green's irreversible brain damage. Dr. Stanford was on permissive TDY orders to Cardiovascular Surgery Associates (CVSA) for further training (a fellowship) in cardiovascular surgery. He was one of several people responsible for reversal of the lines on the heart-lung machine, which caused oxygen-depleted blood to be sent to Mrs. Green's brain. The district court found negligence and divided the liability between the primary surgeon who failed to notice Mrs. Green's distress in time to prevent injury (sixteen percent), the physician's assistant who made the original error (twenty-two percent), and Dr. Stanford who should have performed tests to detect such an error but failed to do so (sixty-two percent).³⁶

In defending the case, government attorneys were allowed to present evidence to establish a record for the defense of borrowed servant. This evidence was permitted, despite a pretrial ruling that the United States could not be substituted for Dr. Stanford on the basis that he was acting in the scope of his Air Force employment, and still argue that he was a "borrowed servant" of CVSA. The district court judge's ultimate ruling was that Dr. Stanford did *not* meet the Wisconsin criteria of a borrowed servant³⁷ even if the doctrine of borrowed servant were available as a defense. Judge Evans noted that the criteria included four elements, the last of which the Government failed to meet. These were:

30. *Id.* at 1265.

31. *Id. Accord*, *McFeely v. United States*, 700 F. Supp. 414 (S.D. Ind. 1988).

32. 10 U.S.C. §§ 801-940.

33. 10 U.S.C. § 892(3).

34. 530 F. Supp. 633 (D. Wisc. 1982), *aff'd*, 709 F.2d 1158 (7th Cir. 1983).

35. 587 F. Supp. 1342 (D. Mass. 1984).

36. 530 F. Supp. 633, 643.

37. *Id.* at 640.

- (1) Did the employee actually or impliedly consent to work for the special employer?
- (2) Was the employee performing the special employer's work at the time of the injury?
- (3) Did the special employer have the right to control the details of the work being performed?
- (4) Was the work of the employee primarily for the benefit of the special employer?³⁸

The judge indicated that the real advantage to having Dr. Stanford on TDY orders to CVSA was not to improve his surgical skills for the benefit of the Air Force but to "get Dr. Stanford off its hands for a while to prohibit scandal and further dissension among the doctors at Wilford Hall. In short, sending Dr. Stanford to Milwaukee was a good way to avoid a nasty embarrassment to the Air Force." He determined that the primary benefit in this situation was the training gained by the Air Force, not the free labor gained by the CVSA.³⁹

The United States appealed, asserting that Dr. Stanford was indeed a borrowed servant and thus CVSA, not the United States, should be held vicariously liable for his negligence. At the Seventh Circuit, two judges of a three-judge panel disagreed.⁴⁰

Despite finding primarily against the Government, the Circuit Court affirmed in a footnote that Dr. Stanford had properly been dismissed as a defendant under the Gonzalez Act, with substitution of the Government.⁴¹ The court also noted that, under Wisconsin law, the United States could properly assert that Dr. Stanford was acting within the scope of his general employment with the Federal Government at the same time he was the borrowed servant of a special employer.⁴² They simply disagreed with the United States that Dr. Stanford met the criteria of Wisconsin law so as to be a borrowed servant.⁴³

The opinion stated it is "clear that the fellowship was intended to benefit the government and Dr. Stanford more than CVSA."⁴⁴ Therefore, they agreed with the lower court that not all four of the requirements under Wisconsin law for a borrowed servant had been met, and that the United States should be held liable for the negligence of Dr. Stanford.⁴⁵ Dr. Stanford's status as a professional (rather than as an hourly wage-earner who has significantly less autonomy) was an important factor in their decision. This case was closer to the situation where the employee "was cooperating with, rather than becoming subservient to, the 'borrowing' employer."⁴⁶ Their final point was that "the Government, as distinguished from a private business enterprise, is not accustomed to loaning its employees to other employers."⁴⁷

Judge Coffey's dissent is important to note because he pointed out that the majority was focusing on the wrong issue in arriving at their decision that Dr. Stanford was not a borrowed servant.⁴⁸ The basic premise of Wisconsin law requires the court to focus on the question of whether the special employer or the general employer received the primary benefit from the specific task the employee was

38. *Id.*

39. *Id.* at 641.

40. 709 F.2d 1158, at 1166.

41. *Id.* n.3, at 1162.

42. *Id.* n. 4, at 1162.

43. *Id.* at 1164.

44. *Id.* at 1163.

45. *Id.* n. 6, at 1164. The court cited *Meka v. Falk Corp.*, 102 Wis. 2d at 156-57 n. 12, 306 N.W.2d at 70, which concerned an unskilled laborer.

46. *Id.* n.6, at 1164, citing *Dorman v. United States*, 460 F. 2d at 428.

47. *Id.* at 1164.

48. *Id.* at 1166.

performing at the time of the injury.⁴⁹ The majority, however, focused on whether the Government or CVSA benefited from the entire six month fellowship. Judge Coffey also noted the weakness in the majority's reliance on only one prong of the four-prong test. He stated:

In the face of the overwhelming evidence that the first three prongs of the face borrowed servant test were established by the government, both the district court and the majority paid no heed to the first three tests and concluded that through the application of only the fourth (primary benefit) test, CVSA was not liable for Dr. Stanford's actions.⁵⁰

He continued that even if one finds that the primary benefit of the program was to the Government, Dr. Stanford had already "spent more than four months learning heart by-pass procedures under the direction of CVSA's surgeons" and his skills had reached the point of no return. The potential minute benefit to the Government, if any, was almost nonexistent when compared to the benefit to CVSA from Dr. Stanford's assistance as a borrowed servant. He also noted that CVSA "saved thousands of dollars while utilizing the services of Dr. Stanford instead of hiring another surgeon."⁵¹

Even more importantly, Judge Coffey agreed with the majority's holding that "Wisconsin law appears to support the government's argument that nothing precludes it from claiming Dr. Stanford was acting within the scope of his general employment at the same time he was the Borrowed Servant of a Special Employer."⁵² Plaintiff argued that she is left without a remedy if the Government is allowed to substitute itself as defendant and still assert the borrowed servant defense. Because they found that Dr. Stanford was not a borrowed servant, the majority opinion did not discuss this argument, except to mention in a footnote its lack of merit.⁵³ Judge Coffey stated, however, that the Wisconsin Borrowed Servant Doctrine "simply transfers the liability for Dr. Stanford's negligence to CVSA." He would have found that the proper application of the doctrine "mandates that Dr. Stanford's negligence cannot be imputed to the government, but rather should have been included in CVSA's settlement with the plaintiff."⁵⁴

A completely opposite decision was reached in *Afonso v. City of Boston*. The situation was similar to *Green*, in that Dr. Exner was an active duty Air Force physician. He was detailed to a private university for his residency under the AFTT program; while there, he treated nonmilitary patients, one of whom was Ms. Afonso.⁵⁵ The government attorneys immediately petitioned to remove the case to federal court and substitute the United States as defendant, in place of Dr. Exner. At the same time, they submitted a motion to dismiss for failure to file a claim. The district court judge, in ruling on the motions, stated that he found troubling the implication of the United States' argument that it is not liable as "master" for any tortious acts committed by Exner while he was "on loan" to the city hospital.⁵⁶ Despite this position, the Government had also argued that Dr. Exner was an "employee" for the purposes of substitution and removal. The court examined the language of 10 U.S.C. § 1089 (c), which provides that if the

49. *Id.*

50. *Id.* at 1167.

51. *Id.* at 1170.

52. *Id.* at 1172.

53. *Id.* n.7, at 1164.

54. *Id.* at 1173.

55. 587 F. Supp. 1342 (D. Mass. 1984).

56. *Id.* at 1344.

district court should "determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court."

Judge Keeton resolved the issue by stating:

I cannot conclude that Congress intended for a federal court to take jurisdiction of such a case simply on the bare assertion by the government that the defendant physician was in the military. If the case were not tried under the Federal Tort Claims Act, the plaintiff would have a right to a jury trial in state court against the individual doctor. The government would have me deprive plaintiffs of that right based solely on an ambiguous certification which does not concede that this is properly a case brought against the sovereign under the F.T.C.A.⁵⁷

Naturally, government attorneys pointed out the decision in the *Green* case.⁵⁸ It was distinguished by Judge Keeton because it did not appear that in the *Green* case there was ever any opposition to the petition to remove to federal court and substitute the United States,⁵⁹ and because Wisconsin law, not Massachusetts law applied.⁶⁰ The judge also stated that, "If the appellate decision is read as holding or implying that the government could have successfully avoided vicarious liability at trial after invoking section 1089(a), I must respectfully predict that, if and when confronted with this issue, the First Circuit and the Supreme Court will hold otherwise."⁶¹ He did not feel that the statute was intended "to let the government in effect have it both ways."⁶² He also noted two other problems. One was a possible conflict of interest for the Government attorney, when the interests of the physician and the Government did not coincide. Second was a possibly inefficient use of judicial resources, because one defendant may not be amenable to suit in federal court and two actions would have to go forth.⁶³

In applying the facts of this case to Massachusetts law of master-servant relationships, he noted the test was "the existence of a right to control the servant's actions."⁶⁴ In contrast to the *Green* court, Judge Keeton found little significance in the Government's interest in the education being received by Dr. Exner. He noted that the military retained no right to control his provision of medical services in the hospital. The salary from the Air Force and the fact that he was subject to military discipline "are not decisive."⁶⁵ The holding was that the United States in this situation would not be liable for any torts committed by its loaned servant, while he was on loan, and, therefore, the case must be remanded to state court where plaintiffs may proceed against Dr. Exner individually and against the city of Boston.⁶⁶

In another 1983 decision, *Anderson v. O'Donoghue*,⁶⁷ the Oklahoma Supreme Court held that:

[A] suit against a military physician individually is proper where the facts disclose that the case is brought under the conditions described in 10 U.S.C. 1089 (f), and that those facts are present under the record in this cause. Inasmuch as the suit may be brought against the physician

57. *Id.* at 1345.

58. *Green*, 530 F. Supp. 633 (D. Wisc. 1982), *aff'd*, 709 F.2d 1158 (7th Cir. 1983).

59. *Afonso*, 587 F. Supp. 1342, 1345, (D. Mass. 1984).

60. *Id.* at 1347.

61. *Id.* at 1345.

62. *Id.*

63. *Id.* at 1346.

64. *Id.* at 1347. Citing, *Cowan v. Eastern Racing Ass'n*, 330 Mass. 135, 111 N.E. 2d 752 (1953).

65. 587 F. Supp. at 1347

66. *Id.*

67. *Anderson v. O'Donoghue*, 667 P. 2d 648, 652 (Sup. Ct. Okla. 1983).

individually, the action may properly be brought against the appellant in state court. The exclusive remedy in federal court provided for in 28 U.S.C. 1346(b) relates to claims against the United States only.

The court pointed out that if 10 U.S.C. § 1089(f) was to be given any meaning at all, it was meant to be an exception to the 1089(a) exclusive remedy provision. Otherwise, the section would be rendered "a nullity."⁶⁸ The court noted that the Tenth Circuit agreed that the Gonzalez Act was not intended to provide absolute immunity to Armed Forces physicians.⁶⁹

In 1987, a District of Columbia statute similar to the Gonzalez Act, which attempted to provide an exclusive remedy against the District for medical negligence of its employees, was construed in the same manner. The court⁷⁰ found, in that the statute contained a provision for indemnification if an employee is held personally liable, "the plain intent of the statute is to permit lawsuits against medical employees in which the District of Columbia is not a party." The District of Columbia attorneys also attempted to argue that because the statute made the District of Columbia the "real party in interest," the District should be substituted in place of Dr. Davis. The court concluded, however, that because the District had consented to the payment of funds from its treasury, it had waived its sovereign immunity and was, therefore, not the real party in interest.⁷¹ In that the case was before the court on a motion for summary judgment, the court determined that there were genuine issues of material fact in dispute and refused to determine liability at that point.⁷²

The *Afonso* case sent ripples of fear throughout the military medical community. For some time since the enactment of 10 U.S.C. § 1089 in October 1976, it had become a widespread expectation that the Government would handle all claims or lawsuits involving medical negligence and that the protected military provider would only need to be present to testify or be deposed. But after *Afonso*, physicians became concerned that their professional lives would be totally disrupted if they were personally named in a lawsuit and, because they were otherwise uninsured, they faced financial doom if found liable. Medical providers may be reassured that, even if they are sued personally, the Gonzalez Act provides for financial reimbursement. Furthermore, the Department of Justice will provide representation for them and, whenever possible, the United States will be substituted as defendant.⁷³

The Department of Justice has asked the military departments to change objectives in the negotiation of affiliation agreements, so as to attempt to obtain agreement of civilian hospitals to cover our residents when they are providing care there. The decision was also made to agree to "premises" liability when there is an exchange of residents. Thus, in those cases where military training programs accept civilian residents and vice versa, the affiliation agreements may determine in advance that each hospital will be responsible for negligence occurring on its premises despite the status of the resident. The civilian resident becomes, by force of the law, the borrowed servant of the institution in which the malpractice occurred. The degree of supervision and control exercised is the basis for that determination. In the converse of that situation, the borrowed servant doctrine will also apply to make our resident (i.e., a Dr. Stanford or a Dr. Exner) the employee of the hospital using his services.

68. *Id.* at 651.

69. *Id.* at 652, citing *Jackson v. Kelly*, 557 F.2d 735, 740, 741 (10th Cir. 1977).

70. *Dower v. Davis*, D.D.C. Civ. No. 86-2658-06 (July 28, 1989), WEST LAW 12847 (not reported in F. Supp.).

71. *Id.* at 7 and 8.

72. *Id.* at 8.

73. 29 Letter from Dep't of Justice to Army, Navy and Air Force (29 Dec. 1989).

By negotiating these provisions in advance, we will be providing better protection for the Air Force residents. They will be covered under the hospital's insurance policy and defended by hospital attorneys. This plan has the additional merit of reducing finger-pointing, because the hospital's insurance covers all of their residents. The temptation to blame the Air Force resident in order to reduce hospital liability is effectively eliminated.

The ultimate effects of the borrowed servant doctrine (whether used as a sword or a shield) are still far from settled. We may be able to eliminate most of the problems by adapting our affiliation agreements to cover as many eventualities as possible. However, more litigation is certain to occur, as the courts continue to wrestle with fairness and equity on a case-by-case basis. And unless a case is taken to the Supreme Court, we may continue to obtain inconsistent results. Ideally, we will be able to obtain the best protection for Air Force residents by arranging their immunity from suit at the outset, obviating the need to assert the defense of borrowed servant.

Autonomy, Consent, and the Conflict of Rights in Health Care

JOSEPH A. PROCACCINO, JR.

The scenario that was relayed from one of the Air Force's medical centers was filled with both a sense of tragedy and despair. A twenty-year-old woman, married to a twenty-one-year-old Senior Airman, came to the medical center with complaints of chest and back pain, as well as headaches and occasional fainting spells. She had not had a medical checkup since her marriage some two years earlier, and even that had been a cursory one. She was not the type of person to see a doctor unless she was "really sick." Neither husband nor wife had any close family members living, nor had they any children.

Following an extensive physical examination the diagnosis came as a horrific shock. The young woman had developed a cancer in her chest that had spread to her spinal cord and was working its way into her brain, causing the blackouts she was experiencing. The consulting physicians were not optimistic in their prognoses, and she was told that her life expectancy was probably not longer than three to four months. Her treating physician did offer that she could undertake a chemotherapy protocol that could possibly extend her life for six to eight months, though with the debilitating side effects such treatments are known to produce. Yet the real dilemma in this tragedy was to unfold in the physician's next statement to her. The woman was also diagnosed as being six to eight weeks pregnant.

After some days of reflection upon what had been told to her, the woman decided to proceed with the chemotherapy. Her decision was firm, and was based primarily on the possibility that, with a successful regimen, she could stay alive long enough to carry her fetus into the stage of viability, allowing it to be born. The treating physician explained to her that chemotherapy carries with it a very high risk of physical and mental damage to a fetus in its early stages. She responded that she was adamantly opposed to abortion, that life itself was precious, and that her one desire was to let this child enter the world as her legacy, a living testimony and creation of a woman who fervently desired to have children. The risk of damage to the fetus was superseded by the possibility of its being born at all, and she was willing to spend her remaining months in the discomfort of chemotherapy to allow her dream to become reality. She was so adamant in her position that, should she enter an irreversible coma or a persistent vegetative state, she instructed the medical staff to do everything possible to keep her alive, even if nothing more than as a human incubator, to get the fetus to reach viability and a subsequent Caesarean Section birth.

The husband in this case was emotionally distraught. He had begged his wife to proceed with an abortion, arguing that the pregnancy itself would place even more strain on her body. He also pleaded that she was being selfish to allow a child to be born, highly likely damaged, with no mother to offer love and support, but leave only a father, with no other family and no substantial income to care for the child. The husband told the physicians that, should his wife become comatose or rendered

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incompetent, he as the next of kin would direct any life sustaining measures be withdrawn, or, in the alternative, have the fetus aborted. He noted that any living will his wife might execute would be of no value anyway, as pregnancy rendered such a document ineffective in the state.

The scenario exemplifies the plethora of medical, legal, and bioethical issues that face the health and law practitioners today. Among the questions raised here are those of determination of competency, informed consent and the right to refuse treatment, assault and battery, substituted judgment, abortion, fetal right versus maternal right, wrongful life, and the role of technology in our society. These questions highlight the need for an often reluctant legal community to set the parameters within which patients, families, and practitioners can decide the most intimate questions of life and death.

The legal dilemmas noted above are contained in perhaps three general categories:

(a) the autonomy of the patient in deciding the course of his own medical care; (b) the role of substituted judgment in allowing others to decide what is in the best interest of someone who may be considered unable to rationalize the circumstances surrounding him; and (c) the balancing of interests where one decision is inextricably tied to another and which affects the autonomous nature of the decisions made.

I. AUTONOMY IN DECISION MAKING

There is a consistent legal history that recognized the autonomy of a competent adult in health care decision making. The now famous ruling that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body" is used as the basis for most cases involving informed consent.¹

The premise for this statement might be found in the earlier Supreme Court decision of *Union Pacific Railroad Company v. Botsford*: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."²

The philosophical underpinnings of autonomous medical decision making are probably best articulated in *Mohn v. Williams*:

Under a free government, at least, the free citizen's first and greatest right, which underlies all others—the right of the inviolability of his person, in other words, the right to himself— is the subject of universal acquiescence, and this right necessarily forbids a physician or surgeon, however skillful or eminent, who has been asked to examine, diagnose, advise, and prescribe (which are at least necessary first steps in treatment and care), to violate, without permission, the bodily integrity of his patient by a major or capital operation, placing him under an anesthetic for that purpose, and operating on him without his consent or knowledge. Kinkade on Torts, Section 375, states that general rule this on subject is as follows: "The patient must be the final arbiter as to whether he will take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal one."³

Recent decisions have been generally consistent in their support of the autonomous principles espoused above.⁴

1. *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92, 93 (1914).

2. 141 U.S. 250, 251 (1891).

3. 95 Minn. 261, 104 N.W. 12 (1905).

4. See, e.g., *In Re Spring*, 405 N.E. 2d 115 (1980); *Bouvia v. Superior Court*, 225 Cal. Rptr. 297 (Cal. App. 1986).

The term "autonomy" stems from the Greek roots of *autos*, meaning self, and *nomos*, meaning a rule. Philosophically, these may be joined to refer to a sense of personal control, and remaining free from the influences and interferences of other persons or organizations. Thus, it is argued that "[a]n informed consent is an autonomous authorization of a medical intervention. . . ."⁵ Yet, the principle of autonomy may indeed come into conflict with the principles of beneficence and justice, and it is here that decision making takes a complex turn.

The famous medical maxim *primum non nocere* "above all else, do no harm" is embodied in the Hippocratic oath and in Florence Nightingale's *Pledge for Nurses*. Should a patient autonomously refuse medical treatment, the above concept, which is the foundation of the principle of medical beneficence, will often create conflict. Health care practitioners are by ethics and training adverse to decisions that would deprive beneficial maintenance of life or health. Add to this conflict the principles of justice and equality, where "equals should be treated equally," and it becomes obvious why not all medical care decision making is neatly defined.⁶

Even where the principles of autonomy in consent are affirmed, most courts today recognize some limitation or balance of interest. *People v. Robbins*⁷ notes: "[T]here is no basis under New York law for denying an adult the right to medical care where such refusal does not pose a threat to the life of others."⁸

The philosophical concepts of beneficence and justice have forced a consideration of "state interests" in the decision-making scheme. Traditionally, these state interests include (1) the preservation of life; (2) the protection of dependent third parties; (3) the prevention of suicide; and (4) the preservation of the ethical integrity and standards of treatment of the medical profession.⁹ Where there is a question, particularly in right to life cases, the courts will often attempt to balance the preservation of life with the quality of that life preserved, and, where the state interests are *de minimis*, will tend to respect the autonomy of the patient. *In re Osborne*, a blood transfusion case, is a prime example.¹⁰ Mr. Osborne, an accident victim, refused a blood transfusion, and the hospital asked for a court order to compel the transfusion on the basis of incompetency and the fact that his death would result in leaving behind a widow and fatherless children. The court recognized the state interest involved, but concluded that Mr. Osborne's right of privacy and religious freedom, as well as a lack of demonstrated incompetence, overrode any state interests in forcing a transfusion. The court also established that his family was well provided for economically, spiritually, and emotionally in the event of his death. This important factor satisfied the third-party protection criterion of state interest, and the court did not interfere. Compare this case to the *Application of the President and Directors of Georgetown College, Inc.*,¹¹ where a mother of a seven-month-old child was semi-conscious and in need of a transfusion. She and her husband, both Jehovah's Witnesses, indicated a refusal, yet the court overrode their wishes, due to what the judge perceived to be incompetence of the patient, requiring the state to act under the theory of *parens patriae*, as well as the argument that her death would leave behind her infant without maternal support.

5. BEAUCHAMP & CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 76 (3d ed. (1989).

6. BEAUCHAMP & WALTERS, CONTEMPORARY ISSUES IN BIOETHICS 30-33 (3d ed., 1989).

7. 88 App. Div. 2d 271, 443 N.Y.S. 2d 1016 (4th Dept. 1988).

8. *Id.* at 1018 (emphasis added).

9. D. MYERS, MEDICO-LEGAL IMPLICATIONS OF DEATH AND DYING 248 (1981).

10. 294 A.2d 372 (D.C. App. 1972).

11. 118 App. D.C. 80, 331 F.2d 1000, *reh'g denied*, 118 App. D.C. 90, 331 F.2d 1010, *cert. denied*, 377 U.S. 978 (1964).

Autonomy may be limited by more nebulous societal interests. An article appearing in the *Los Angeles Times* in 1975 concerned a fifty-eight-year-old man who wished to sell one of his eyes for \$35,000 to pay for an operation his wife needed on her jaw.¹² He had no insurance, and refused to accept welfare. The reaction to such an ad was one of revulsion and rejection. "Certainly," many might argue with the gentleman, "it is wrong to prostitute your body, even if it be its tissue and organs. It's a form of mutilation, regardless of the intended purpose." The gentleman could respond, "If that is the case, why do some states still permit the sale of blood? Is not blood a tissue?" Or, more simply, he could choose to say, "It's my body, and I should have the right to do with it as I see fit." The rationalization of the limitation of autonomy in this situation is difficult, yet we as a society perceive problems by condoning such practices. An analogous argument may be created in the example of *Van Holden v. Chapman*,¹³ where the murdered of singer John Lennon, sentenced to serve from twenty years to life in prison could be force-fed to prevent starvation from a hunger strike. The court explained that the state's interest in the preservation of life, as well as the power to regulate orderly institutions, allowed it to supersede the prisoner's right of privacy.¹⁴

The issue of privacy in health care is being determined to a great extent at the time of this writing at the U.S. Supreme Court in the case of *Cruzan v. Director of Missouri Department of Health*.¹⁵ At the state Supreme Court level, the court ruled that a patient has no unrestricted constitutional right to privacy.¹⁶ The results of this case could have a wide-ranging impact on all future right-to-refuse cases.

In dealing with the respect of medical standards, state interest is probably best demonstrated in Air Force medical facilities where Jehovah's Witness patients, seeking elective or nonemergency surgery, demand no blood transfusion. It is the opinion of the Claims and Tort Litigation Staff, Office of The Judge Advocate General, that the hospital may choose not to treat the patient, but instead direct a transfer of the patient to another facility that would comply with the patient's wishes. While it is important to respect the patient's religious preferences, the hospital also has an obligation to support its medical staff in providing treatment in accordance with accepted standards of medical care.

Finally, the intervention of the state will be on the basis of the severity of the patient's condition. For example, refusal surgically to correct a cleft palate will meet with much less resistance than a refusal to undergo an emergency life-sustaining procedure.

II. THE ROLE OF SUBSTITUTED JUDGMENT

Where a determination of incompetency is made due to age or mental disability, medical care decision making has for the most part been permitted through the principle of substituted judgment. This concept was given great publicity and impetus in the now famous case of *In re Quinlan*, where the court allowed Karen Quinlan's parents to substitute their judgment for her in the decision to remove extraordinary means of life support, and where Karen was comatose and unable to decide for herself.¹⁷ The case set a precedent for scores of subsequent similar cases.

12. L.A. Times, Feb. 1, 1975, sec. II, at 1, col. 3.

13. 87 App. Div. 2d 666, 450 N.Y.S. 2d 623 (4th Dep't 1988).

14. Note, however, that an opposite conclusion was reached in the case of *Zant v. Privatte*, 282 Ga. 832, 286 S.E. 2d 715 (1982).

15. 760 S.W. 2d 408 (Mo. 1988), U.S. Supreme Court Docket, No. 88-1503, cert. granted, 109 U.S. 3240.

16. 760 S.W. 2d 408 (Mo. 1988).

17. 70 N.J. 10, 355 A.2d 647 (1976).

The concept appears to be based on the theory that a patient's family or interested guardian would act with the best interests of the patient in mind. The critical question here becomes "Whose best interests are really being served in the decision-making process?"

Often, decisions may be made by a next of kin ostensibly with the patient's interests in mind, where, in reality, the next of kin may stand to gain personally or economically from the decision. It is extremely difficult to discern the true intentions of third parties. In a malpractice case the author was involved with many years ago, an elderly female was placed in an irreversibly comatose state by a physician who was draining fluid from her brain, and was kept alive by use of a ventilator. The woman's only living relative, a daughter, was appointed her guardian, and pursued malpractice action. Some months later, a settlement exceeding half a million dollars in cash was reached without litigation. Within forty-eight hours of disbursement of funds to the daughter, she substituted her judgment for her mother and requested removal of the life supports. This was honored, and the mother died about twenty-four hours later. Whether the decision to remove life support was an act of love or of greed is known only to the daughter, but her action certainly leads one to raise the issue of benefit.

The Kentucky case of *Strunk v. Strunk*¹⁸ may best serve to demonstrate the complexity of substituted judgment. Here, an equity court allowed a mother to substitute her judgment for a severely retarded and institutionalized son and to direct that he donate a kidney to a mentally normal brother who suffered from a deadly kidney disease. The court based its decision essentially on a "best interests" theory, suggesting that, when the retarded brother's parents died, the brother would be the only one who would be around to provide love and support. Thus, it was in the retarded brother's best interest to keep the other brother alive.

Equally noteworthy in this case is a dissent that quoted *Prince v. Massachusetts*: "Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make a decision for themselves"¹⁹ The inference from the dissent was a questioning of who was truly the beneficiary in the case. Was the rationale used in the case a fiction to mask the true intent of the parties? Perhaps some might branch out even further to speculate that such decisions do nothing more than turn mental asylums into organ farms, when it is "presumed" that incompetent individuals would be happy to donate organs due to the indirect ensuring of emotional benefit.

At least one jurisdiction, Wisconsin, has called substituted judgment into question and not permitted its use in a similar case.²⁰ For the most part, however, despite the potential flaws suggested above, substituted judgment remains perhaps the most workable solution in decision making for care of incompetent patients. *In re Guardianship of Roe* suggests the following factors be included in reaching substituted judgment decisions: (1) the incompetent's expressed preference regarding treatment; (2) the incompetent's religious beliefs; (3) the impact upon the incompetents's family; (4) the probability of adverse side effects from treatment; (5) the consequences of the treatment; and (6) the prognosis with treatment.²¹

Finally, on this issue, it is important to note that, while substituted judgment is intended to act in the patient's best interest, it does not always follow that substituted

18. 445 S.W. 2d 145 (Ky. 1969).

19. 321 U.S. 158, 166 (1944).

20. See *In re Guardianship of Pescinski*, 67 Wis. 2d 4, 226 N.W. 2d 180 (1975).

21. 383 Mass. 415, 421 N.E. 2d 40 (1981).

judgment is necessarily perceived by outsiders as being in the best interest of the patient. Substituted judgment seeks to relate the actual wishes of the patient had he been competent. It is not what a reasonable person or average person would do under similar circumstances, but instead what a particular patient would have decided to do.

III. AUTONOMOUS CONFLICT AND THE RIGHTS OF OTHERS

Circumstances may inevitably arise where the decision of one individual to refuse or to receive medical care may have a direct and adverse effect upon another individual, to the point where one or both lives may be in jeopardy. Such is the case in *McFall v. Shimp*.²² Here, the plaintiff suffered from a rare bone marrow disease and had a poor prognosis. Testing for compatible donors for a life saving marrow transplant revealed a cousin as a suitable donors. The cousin, however, refused to donate the marrow for the transplant, and the plaintiff sought an injunction to compel the cousin to submit to the procedure. The court, while finding the cousin's conduct indefensible, refused to issue the injunction. It explained:

The common law has consistently held to a rule which provides that one human being is under no compulsion to give aid or take action to save that human being or to rescue. . . . For our law to *compel* the Defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual and would impose a rule which would know no limits and one could not imagine where the line would be drawn.²³

The idea of forcibly intruding on one's person, where the individual competently refuses such intervention, flies in the face of the legal principles and cases documented previously. Even in criminal cases, the courts have been reluctant to breach the privacy of a suspect's body for evidence, unless the intrusion was of a minimal nature.²⁴ In bullet removal cases, for example, the Supreme Court would not permit any intrusive procedure if it were "severe" and where the suspect was placed at risk.²⁵

Yet, there is no conflict of interest in this area more challenging than that of a woman versus the fetus in the woman's womb. That one's life or health may affect the life or health of the other is invariably tied, if by nothing more than the umbilical cord. At common law, a child *en ventre sans mere* (in the mother's womb) was considered part of the mother with no separate existence. The status of fetal rights was addressed in the famous abortion decision of *Roe v. Wade*,²⁶ where the Court, in recognizing the right of a woman to bodily privacy, did not find a "compelling interest" in protection of the fetus until the third trimester of pregnancy,²⁷ nor did it see personhood in a fetus.²⁸ *Roe* established that even in the third trimester, abortions may still be performed where the life or health of the mother is in danger.²⁹ Thus, in relation to fetal interests, the woman's interests were given greater weight in *Roe*. *Roe* and its progeny dealt specifically with the issue of a willful termination of pregnancy and not necessarily the

22. 10 Pa. D&C 3d 90 (Allegheny Ct. Common Pleas 1978).

23. *Id.* at 91.

24. *Rochin v. California*, 342 U.S. 165, 172 notes: "Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of stomach contents - this course of proceedings by agents of the government to obtain evidence is bound to offend even hardened sensibilities."

25. See *Winston v. Lee*, 470 U.S. 753 (1985).

26. 410 U.S. 113 (1973).

27. *Id.* at 165.

28. *Id.* at 158.

29. *Id.*

fetal status where abortion was not a factor, nor where the life of the mother was in danger without the abortion. Yet circumstances have risen where fetal interests have been considered in nonabortion situations. Many states have statutorily provided that a fetus is a person from the moment of conception, so far as may be indicated for any interests it would have in the event of its subsequent birth.³⁰

It is normally presumed that a mother would act for the protection and survival of her wanted unborn child. To what extent, however, remains in question. A 1983 *Santa Barbara News Press* story noted the following:

A premature, but fairly healthy, infant was delivered by Caesarean section from its mother some 64 days after she had suffered brain death. The mother was maintained on a respirator for the nine-week period after she was pronounced legally dead under California's brain death statute. She was 22-1/2 weeks pregnant at the time of her death. Delivery occurred at 31 weeks when doctors determined the fetus had stopped growing within his mother's womb.³¹

Had the mother in the above article refused to be maintained on life support, would a court have compelled such maintenance for the protection of the fetus? In the balancing of interests, it could be argued that the potential life of the fetus outweighed the interests of a dead body. The status of post-mortem bodily autonomy remains unclear.

The issue becomes even more complicated where the mother decides on a course of conduct or treatment that has a direct and arguably adverse impact on the interests of the fetus. In an extremely controversial decision in Washington, D.C., a twenty-seven-year-old pregnant female was diagnosed with cancer and given only days to live. She was admitted to George Washington University Hospital where a decision was made to attempt to save the baby by Caesarean Section. Included in the testimony offered in court for an order to permit such a proceeding were statements that the fetus had a fifty percent chance of survival, yet would likely cause the patient's death. While the facts are in controversy, there is substantial evidence that the patient made it known to the hospital staff that she did not want to submit to the operation. The court, however, granted the order for the procedure.³² The baby died two hours after birth, and the patient succumbed two days later. The court supported its decision by explaining: "The Caesarean Section would not significantly affect A.C.'s condition because she had, at best, two days left of sedated life; the complications arising from the surgery would not significantly alter that prognosis. The child, on the other hand, had a chance of surviving delivery."³³

The court also placed a great deal of reliance on two similar cases where the decisions were in favor of the fetal interests. In *In re Maydun*,³⁴ a pregnant woman in labor for two days was sent to the hospital, where, after an additional eighteen hours, birth still did not occur. The doctors explained to her that a Caesarean Section was needed to prevent brain damage or fetal demise, but the patient, distrustful of surgery, refused. The hospital obtained a court order compelling the surgery, and the operation was successfully performed.

In the other significant case, *Jefferson v. Griffin Spalding Hospital Authority*,³⁵ a pregnant woman with *placenta previa* refused to submit to a Caesarean Section on the basis of her religious convictions, and desired a vaginal delivery. Doctors argued

30. See, e.g., Cal. Civ. Code Sec. 29.

31. *Santa Barbara News Press*, Mar. 31, 1983, at A-12.

32. See *In re A.C.*, 533 A. 2d 611 (D.C. Ct. App. 1987).

33. *Id.* at 617.

34. 114 Daily Wash. Law Rptr. 2233 (D.C. Sup. Ct. July 26, 1986).

35. 247 Ga. 86, 274 S.E. 2d 457 (1981).

that a vaginal delivery would almost certainly cause the death of the infant, and also result in harm to the mother, but that a Caesarean Section would present insignificant risk to the mother's life and give the fetus a good chance of survival. The court overruled the mother's objections and gave the hospital the authority to proceed with the Caesarean Section.

It is important to note that these two cases differ in one important aspect from the A.C. case in that, except for the usual risks inherent in Caesarean Section surgery, the women were not *per se* at any medical or health risk. A.C.'s condition, however, was such that the trauma of the surgery could have hastened her death. Ironically, whether or not the A.C. decision is correct, it seems to contradict the explanation of the court in *McFall v. Shimp*,³⁶ where a forced bodily intrusion, even to save the life of another, was considered unreasonable.

The case law tends to establish support for fetal interests to life where there is no substantial risk to the mother, or when the interests of the mother's own preservation of life are not as compelling. Yet, in the original scenario, we are confronted with a mother who wants to have her baby, even at increased risk and pain to herself. Were it merely the life of the child at stake, then there would likely be no controversy. We must, however, differentiate between life itself and the quality of that life, and see which parties may have a vested interest in establishing those qualifications. Certainly it can be argued that there are three parties directly involved in the matter with varying interests: the mother, in whose body the child grows and who maintains the autonomy of competent decision making as to her own course thus far; the husband, who is father to the potentially "defective" child and will be left as the single parent; and the fetus itself, which may be aborted or born with perhaps devastating defects. Should the interest of the father and the fetus be recognized and measured with the mother's?

In *Planned Parenthood of Central Missouri v. Danforth*,³⁷ the Supreme Court struck down a Missouri statute requiring spousal consent for abortion, stating "the state cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period [first trimester]."³⁸ Arguing the reverse, then, it would appear that the spouse may not interfere with his wife's right *not* to have an abortion. Should the wife become incompetent, the husband may normally act as the surrogate decision maker, yet it has already been noted that substituted judgment is based not on the best interests of anyone other than the incompetent patient, as the patient would have articulated those personal interests to be if she were competent. We know her intentions while she was competent, and on this basis alone it would be difficult to permit the principle of beneficence to supersede the woman's autonomy *per se*.

The fetal interests are also compelling, not only because of the life and death issue, but also because of the quality of life issue. It is interesting to note that the "*Baby Doe*" regulations concerning care for handicapped infants³⁹ directed that consideration of quality of life in whether or not to provide extraordinary care would not be an issue.⁴⁰ Certainly, it can be argued hypothetically that a woman carrying a fetus with Downs Syndrome could not be compelled by her husband to abort the fetus. On that basis, the analogy to the present case is clear. But in at least four jurisdictions,⁴¹ courts have permitted an action for "wrongful life" on the part of a child, in which the child can

36. 10 Pa. D & C 3d 90 (Allegheny Ct. Common Pleas 1978).

37. 428 U.S. 52 (1976).

38. *Id.* at 69.

39. See 50 Fed. Reg., 14,887-892 (Apr. 15, 1985).

40. *Id.* at 14,889.

41. California, Washington, New Jersey, Colorado.

contend that he would rather not have been born than be born with the defect caused by the defendant.⁴² Would the child have an action against the hospital for wrongful life here, arguing that the hospital knew the child could be born handicapped, yet did not abide by the father's wishes to terminate the pregnancy (presuming, of course, the mother was no longer competent)? If the fetus is indeed a person from the moment of conception, should it not, through a representative, be able to express its own preferences as to the conditions of its life, just as we allow critically ill adults to decide?

IV. CONCLUSION

Medical decision making is never an easy task. But the complexities created by modern life sustaining technology and conflicting interests make many of these decisions Solomonic. It would be expedient to decide in favor of life at all cost, yet, are (or should) the best interests of all affected parties considered in that decision? The dilemma presented here is one of a woman's right to choose, but as we look at the results of her choice and examine their consequences, we, as attorneys, must understand that, in bioethical issues such as this, best interests may be most often in the mind of the beholder.

The mother, the father, the fetus. Whose autonomy, whose consent, whose rights should survive the conflict? *Nulla lex satis commoda omnibus est.* . . .⁴³

42. See *Turpin v. Sortini*, 31 Cal. 3d 220, 182 Cal. Rptr. 337, 643 P.2d 954 (1982); *Harbeson v. Prake-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983); *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984); *Continental Casualty Co. v. Empire Casualty Co.*, 713 P.2d 384 (Colo. App. 1985). It is interesting to note that the term "wrongful life" takes one of its earliest forms in a case some 17 years old, *Zepeda v. Zepeda*, 41 Ill. App. 2d 20, 190 N.E. 2d 145 (1963), involving an action by plaintiff against his father for damages because plaintiff had been born an adulterine bastard. The court recognized the feasibility of a wrongful life and pre-natal action as consistent with the elements of tort, yet did not feel it to be the court's position to inaugurate a new cause of action in the state. The dismissal of the case was affirmed.

43. 34 T. LIVY, AB URBE CONDITA, 3. (There is no law sufficiently acceptable to everyone.)

Fear of Cancer—A Legitimate Claim in Toxic Tort Cases?

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I. INTRODUCTION

At least to nonsmokers, it would seem anomalous that a sixty-year-old woman who had smoked cigarettes for twenty-five years could recover damages for her fear of getting cancer from the pollution of her well-water, when the risk of cancer from the contaminated water was far less than the risk of cancer from smoking. If at time of trial she did not have cancer, or any valid scientific prospect of ever contracting it from the water, how could she recover money for her anxieties and fears? Yet that is exactly what happened in *Clark v. United States*,¹ a 1987 Air Force case in the state of Washington. For those accustomed to hearing that science has discovered the carcinogenicity² of yet another familiar food, drink, or substance,³ the result in *Clark* is surprising. Perhaps just as surprising is the fact that all states allow recovery for fear of cancer, although, fortunately for defendants, most of them require more than simply the plaintiff's bare claim that he is afraid.

The purpose of this article is to review the development of the "fear of cancer" claim, identify the factors considered by the courts in deciding this type of claim, and ultimately sensitize the Air Force lawyer to the recent trends in the law of liability and damages for emotional reactions in toxic tort cases. As the only Air Force case yet to address the issue in a reported decision, and as a case representing the outer limits of recovery for this type of damages, *Clark* serves to illustrate many of the points of this article.⁴ There are many sources already in existence on the subject of fear of

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1. 660 F. Supp. 1164 (W.D. Wash. 1987), *aff'd*, without op., 856 F.2d 1433 (9th Cir. 1988). An expert witness at trial calculated that by smoking, six of seven adult plaintiffs in *Clark* increased their risk of cancer from 1 in 100 to 12 in 100 (Record, 1488-89), while the risk from the contamination of the water was found by the court itself to be no more than 1 in 1 million, and probably less, 660 F.Supp. at 1175, a fact that the plaintiffs had been told by county health department officials soon after the contamination had been discovered.

2. A carcinogen is any cancer-producing substance. STEDMAN'S MEDICAL DICTIONARY (24th ed. 1982).

3. "In the last quarter century, no single substance has been the subject of more conflicting reports [of links to cancer and other health problems] than caffeine...." Brody, *Personal Health*, N.Y. Times, May 18, 1989, sec. B, at 8, col. 1.

4. No pretense is made that *Clark* has any significant precedential effect. The case applied only Washington law and can be limited to that jurisdiction. Furthermore, the only written opinion was that of the trial court, which skimmed on legal analysis. And, finally, the damages were relatively modest.

cancer (articles from environmental reporters,⁵ law review articles,⁶ and others),⁷ and the reader would be well advised to consult them in addition to this article.

II. REASONS FOR FEAR OF CANCER CLAIMS

The phrase "toxic torts"⁸ is misleading to the extent that it implies any new cause of action for wrongs that occur when people are exposed to hazardous substances released into the environment. Toxic torts are based on the same three general theories of liability that underlie the rest of tort law: intentional interference with plaintiff's person or property, negligence, and strict liability.⁹ As grounds for recovery, toxic tort complaints allege nuisance, trespass, occasionally battery, strict liability, products liability, and most frequently, various forms of negligence.¹⁰

In *Clark*, the court eventually found the Air Force liable for contamination of some wells near McChord Air Force Base on a theory of negligence *per se*.¹¹ *Clark* involved nine plaintiffs who owned or leased land adjacent to McChord. Mary Clark, the lead plaintiff, lived on ten acres outside the west gate, bordering on the base, and just a short distance across the street from the tee to hole number 3 on the base golf course.¹² During the 1950s and 1960s the Air Force used a number of landfill sites under McChord's present-day golf course to dispose of various liquid and solid wastes, including materials containing the solvent trichloroethylene (TCE). During the passage of over twenty years, some of the TCE leached into the groundwater.

In 1983, TCE and one of its derivatives, dichloroethylene (DCE), were found in plaintiffs' wells in trace amounts. The Environmental Protection Agency (EPA)

5. See generally Pagliaro & Lynch, *No Pain, No Gain: Current Trends in Determining Compensable Injury in Toxic Tort Cases*, 3 *Toxics L. Rep.* (BNA) 271 (Aug. 9, 1989) (general overview); Gluckstern, *Cancer Fear Claims: Current National Judicial Trends*, 2 *Toxics L. Rep.* (BNA) 947 (Jan. 4, 1989) (New Jersey cases leading to overview); Willmore, *In Fear of Cancerphobia*, 2 *Toxics L. Rep.* (BNA) 559 (Sept. 28, 1988) (criticism of expanded liability with extensive policy discussion by former Deputy Assistant Attorney General for Torts); Lees-Haley, *Cancerphobia and Fear of Future Illness*, 3 *Toxics L. Rep.* (BNA) 418 (Sept. 13, 1989) (psychologist's perspective with practice defense tips); Rothman & Maskin, *Defending Immunotoxicity Claims*, 3 *Toxics L. Rep.* (BNA) 1219 (Mar. 1, 1989).

6. See generally Allison, *Evidence Supporting Recoverable Damages for Potential Disease*, 24 *TORT & INS. L.J.* 39 (Fall, 1988) (good overview although oriented towards strict liability cases); Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?* 53 *FORDHAM L. REV.* 527 (1984) (excellent survey and critical analysis of development of fear of cancer claims; one of the earliest major articles); Note, *Sterling v. Velsicol Chemical Corp.: Emotional Distress Damages for the Duration of Toxic Exposure*, 3 *UTAH L. REV.* 759 (1989); Gale & Goyer, *Recovery for Cancerphobia and Increased Risk of Cancer*, 15 *CUMB. L. REV.* 723 (1985).

7. See Whitehead, Espel & Swanson, *Toxic Tort Damages Theories: Recovery for Possible Future Consequences* (1988) (thorough overview, excellent analysis) (handout distributed at toxic tort seminars by Marc Whitehead of the Minneapolis, Minnesota law firm of Popham, Haik, Schnobrich & Kaufman; copy available through that firm or on file at HQ USAF/JACC); Wrubel, *Emerging Damage Issues in Toxic Tort Litigation*, in *HAZARDOUS WASTE AND TOXIC TORTS*, 283 (1987); W. PROSSER & W. KEETON, *THE LAW OF TORTS* sec. 54, at 363 nn. 34 and 34.5 (5th ed. Supp. 1984); 723 (1985); Annotation, *Future Disease or Condition, or Anxiety Relating Thereto, as Element of Recovery*, 50 *A.L.R.4th* 13 (1986).

8. See generally Kanner, *Future Trends in Toxic Tort Litigation*, 20 *RUTGERS L.J.* 667 (1989).

9. W. PROSSER & W. KEETON, *supra* note 7, sec. 7, at 31-32 (5th 1984).

10. The complaints of the plaintiffs in *Clark* alleged nuisance, trespass, negligence, negligence *per se*, and *res ipsa loquitur*. See Kanner, *supra* note 8, at 668; Gordon & Westermorf, *Liability Coverage for Toxic Tort, Hazardous Waste Disposal and Other Pollution Exposures*, 25 *IDAHO L. REV.* 567, 570 (1989).

11. 660 F. Supp. at 1177. However, negligence *per se* is not ordinarily found in similar cases. See Bush, *Can You Get There From Here?: Noncompliance with Environmental Regulations as Negligence Per Se in Tort Cases*, 25 *IDAHO L. REV.* 521 (1989) not citing *Clark*, however.

12. Mary Clark's property contained rental units in addition to her own house. Mrs. Clark, her daughter, two grandsons, and one tenant (Mr. Gravatt) were plaintiffs. The other plaintiffs were Mr. and Mrs. Edwin Nojd, neighbors of Clark's, and their two adult daughters.

had labeled TCE a probable carcinogen in the 1970s.¹³ Although the local health department determined that the contamination was of no actual health concern,¹⁴ the neighboring residents brought an action under the Federal Tort Claims Act (FTCA)¹⁵ alleging that they had been injured by the Air Force's negligent siting and operation of the McChord waste disposal sites. Trespass and nuisance were also alleged.¹⁶ In addition to claiming decreased property values, decreased rental income, and inconvenience, the plaintiffs sued for emotional distress that they said they suffered upon learning that carcinogenic substances had leached into their groundwater.

After trial before judge alone,¹⁷ the court found that the plaintiffs had failed to prove common law negligence. However, the court went on to find negligence *per se* owing to violations of Washington pollution statutes and violations of Air Force regulations governing the operation of landfills.¹⁸ The statutes and regulations considered were the ones in effect in the 1950s and 1960s, when the disposal practices were in effect. Interestingly, despite the court's statement that common law negligence was not proved, the elements of that tort do seem to be present in the court's findings. The court declared that the Air Force's failure to follow the statutes and regulations made it foreseeable that groundwater pollution would occur, that the acts of the Air Force in siting and operating the landfills were acts "which a reasonably careful person would not do under the same or similar circumstances," and that the violations were the proximate cause of the contamination of the wells.¹⁹

The fundamental issue in most toxic tort cases is negligence,²⁰ where the analysis involves the traditional questions of duty and foreseeability, breach, and causation. Because the FTCA permits recovery only where there is a negligent or wrongful act,²¹ the focus of this article will be primarily on cases involving negligence.²² One of the key elements of any tort liability, including that premised on negligence, is that there must be damage (or actionable harm).²³ An interference with plaintiff's rights, without harm or injury, is not actionable. Once actionable harm is shown, plaintiff is then entitled to recover resulting damages. The term "damages" means the measure of the compensation to be made to plaintiff after liability has been established.

13. Probable carcinogen status was based on animal studies on a certain strain of mouse. By time of trial in 1987, there was still no consensus on whether TCE was actually a carcinogen, and the animal studies for this chemical were criticized, as are animal studies in general. The EPA had placed TCE in its lower of two categories for probable carcinogens, the one used where there is inadequate evidence from human studies. 49 Fed. Reg. 46,294 (Nov. 18, 1984). See also *infra* notes 164-69 and accompanying text.

14. See *infra* notes 121-22 and accompanying text.

15. 28 U.S.C. §§ 1346(b), 2671.

16. The court brushed the trespass and nuisance theories aside in its findings, concentrating on negligence. 660 F.Supp. at 1183.

17. The FTCA does not permit trial by jury, 28 U.S.C. § 2402.

18. 660 F. Supp. at 1177.

19. *Id.* at 1173. The court said in *Clark* that "the Eleventh Commandment in this state was that, 'Thou shalt not pollute thy neighbor's well.'" *Id.* at 1183. That comment referred to rules found in state statutes, which implies the court felt there was no similar common-law duty in the state of Washington. However, under a foreseeability test, it would seem foreseeable that unreasonable use of one's land could pollute a neighbor's well, which should then give rise to a duty to avoid such harm.

20. See *Ayers v. Township of Jackson*, 106 N.J. 557, 525 A.2d 287, 300-01 (1987), citing *Developments in the Law - Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1610-11 (1986). *Ayers* was a plaintiff groundwater contamination case against a municipality; it contains an excellent discussion of toxic tort litigation in general, as does the cited law review article.

21. 28 U.S.C. § 1346(b). Intentional torts, except for those committed by law enforcement agents or arising out of health care functions, are generally not payable under the FTCA. See 28 U.S.C. § 2680(h), 10 U.S.C. § 1089(e), Air Force Reg. (AFR) 112-1, para. 12-10a(4).

22. Many of the asbestos cases discussed *infra* notes 86-95 and accompanying text are combined strict liability and negligence cases, but are still instructive.

23. *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1136 (5th Cir. 1985).

In toxic tort cases involving known physical injury or property damage, the same damages are available as in any tort case. But many times there is not a traditional actionable harm or injury, and consequently the traditional damages do not apply. The absence of traditional injury is a significant way in which toxic torts differ from other torts.²⁴

To illustrate the point, assume that base civil engineers are going to spray pesticides to control mosquitoes. On the way to the job, a crew negligently drives one of the spray trucks into a car, dumping pesticides onto the civilian driver (a father of four) and his wife. The father later dies as a result of the chemicals, not the impact of the crash. The mother is severely burned and disfigured, but lives. In that situation, the following types of damages²⁵ may be recovered for the father's injuries and death: medical expenses, pain and suffering, and lost earnings. The mother may recover for medical expenses, perhaps disfigurement, pain and suffering, lost earnings, loss of enjoyment, loss of consortium, and possibly emotional distress (the latter on a bystander theory). There is nothing unusual about this type of case in that the injuries are direct, immediate, and obvious. It is nothing more than an automobile personal injury case where the injuries are caused by massive exposure to chemicals. Similarly, in a case where the Air Force negligently releases into the air a cloud of highly toxic chemicals that are breathed by citizens and cause immediate injury or death, there is little difference from other torts.

In the more typical toxic tort case, however, there is usually no discrete moment when one can identify an exposure sufficient to cause actionable physical injury. The harm occurs over a long period of time, not through a one-time massive exposure, but through far more subtle means such as undetected and unseen groundwater contamination, asbestos fibers in the air, radon seeping from the ground through the house, and long-term radiation exposure.²⁶

Even more important, at the time of suit in many toxic tort cases, the plaintiff may not actually be suffering from any readily diagnosable disease or injury. Or, there may be changes occurring in plaintiff's body that will eventually lead to the disease, but which cannot now be identified. Yet, twenty years later he may develop a condition such as cancer that actually is caused by the contamination. For instance, it is scientifically accepted that the latency period for mesothelioma type cancer from asbestos exposure may be twenty to forty years or more.²⁷

Moreover, in many cases, there may simply be no physical harm whatsoever from the exposure, either now or in the future. Or, if physical harm does exist, causation can never be established, which is the functional equivalent of no harm at all.²⁸ In their original complaints, the *Clark* plaintiffs variously alleged physical injuries including skin cancer, lymphatic cancer, and bleeding disorders. However, by the time of trial, they realized they could not establish causation, and dropped any allegations that they suffered a present disease or diagnosable injury from the contamination.²⁹ Causation is inextricably tied to latency, because the longer the period from exposure to disease, the more difficult

24. See, e.g., *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 173-74 (Mo. App. 1988) (massive toxic tort litigation over chemical spills and emissions in Missouri).

25. See generally 22 AM. JUR. 2D DAMAGES, §§ 130-276.

26. *Developments in the Law - Toxic Waste Litigation*, supra note 20, at 1463.

27. See *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 517 (5th Cir. 1984); cf. *DeStories v. City of Phoenix*, 154 Ariz. 604, 606, 744 P.2d 705, 707 (Ariz. App. 1987).

28. See generally Gold, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion and Statistical Evidence*, 96 YALE L.J. (1986); Note, *Proof of Cancer Causation in Toxic Waste Litigation: The Case of Determinacy v. Indeterminacy*, 61 S. CAL. L. REV. 2075 (1988); *Elam v. Alcolac, Inc.*, 765 S.W.2d at 173-188 (thorough discussion of toxic tort causation).

29. The court found there had been no physical injury to any plaintiff, 660 F.Supp. at 1201.

it is to prove causation. Any number of other exposures or disease processes can intervene over the years to create the complained-of condition.³⁰

The combined factors of latency and causation are the primary reasons a fear of cancer claim is attractive to plaintiffs.³¹ Where there is no present disease, an attempt can be made to redefine the fear itself as the actionable injury. Then plaintiff eliminates the expensive and perhaps insurmountable task of proving causation of a physical disease; the only causation plaintiff need show is that learning of the contamination and his exposure caused him to be afraid.³² The issue when plaintiffs attempt this approach becomes whether and to what extent the court will require that "something else," such as an objective physical injury or condition, accompany plaintiff's fear before recovery is allowed.

Fear of cancer claims are often found combined with claims for "increased (or enhanced) risk of cancer," another outgrowth of the toxic tort case where no present physical injury exists or can be proved, or where a minimal injury pales in comparison with the dreaded disease of cancer.³³ In an increased risk of cancer claim, the plaintiff alleges that he should be compensated because the toxic exposure has raised the chance that he will develop cancer in the future. The court is asked to award damages despite the fact that no one can know with certainty whether the dire consequences will ever come to pass. Despite the apparent novelty of such claims, they have been said to be "conceptually analogous to the claim of a personal-injury plaintiff with a damaged knee to recover damages for the prospective onset of an arthritic condition that may result from the knee injury."³⁴

Generally, in these claims, courts require expert testimony that the plaintiff is reasonably certain (at least more than fifty percent likely), from a medical standpoint, to develop cancer in the future.³⁵ Increased risk of cancer is thus harder to pursue than fear of cancer, because it forces the plaintiff to find expert medical proof on difficult causation issues, and usually such proof falls short of the reasonable medical probability standard. Because of the difficulty plaintiffs face, the courts sometimes seem more sympathetic to fear of cancer claims, and definitely are more inclined to award damages for medical expenses to monitor plaintiff via regular examinations to ensure the prompt detection of cancer if it occurs.³⁶ Further, courts are beginning to hold expressly that plaintiff will be allowed to sue the same defendant again for

30. See generally Dangel, *Proof of Causation in Toxic Tort Cases*, 74 MASS. L. REV. 169 (1989) (citing two important cases: *Lynch v. Merrell-National Laboratories*, 830 F.2d 1190 (1st Cir. 1987), and *In re Agent Orange Products Liability Litigation*, 611 F.Supp. 1223 (E.D. N.Y. 1985), cert. denied, 484 U.S. 926, 98 L.Ed.2d 249, 108 S.Ct. 2898 (1988)); Weiner & Abbott, *Proving Causation for Toxic Torts*, 9 CALIF. LAW. 80 (Apr. 1989).

31. Another highly significant factor is the general rule against splitting causes of action, which forces an injured plaintiff to attempt to recover for all his injuries "presently ascertainable and foreseeably predictable and proximately resulting from a single tort," Annotation *supra* note 7, 2, at 24. In response to this rule, courts have been holding with more frequency that if plaintiff does later develop cancer, suit will not be barred despite the instant action. *Clark* permits a later suit, 66 F. Supp. 1178. See also *Ayers v. Township of Jackson*, 525 A.2d 287, 300 (1987) (pointing out that with a "discovery rule" for statutes of limitations, the rule against splitting causes of action is inapplicable).

32. Willmore, *supra* note 5, at 562.

33. See generally *Mauro v. Raymark Industries, Inc.*, 116 N.J. 126, 561 A.2d 257 (1989) (a leading case summarizing other cases); Pagliaro and Lynch; Gluckstern; Whitehead, Espel and Swanson; Dworkin; *supra* notes 5, 6, and 7; Pierce, *Recovery for Increased Risk of Developing a Future Injury From Exposure to a Toxic Substance*, 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 10256 (June 1989); Decker, *Boyd v. Orkin Exterminating: Implications for the Future*, 3 Toxics L. Rep. (BNA) 457 (Sept. 20, 1989) (discussing a Georgia case involving chlordane exposure).

34. *Mauro*, 561 A.2d at 264.

35. *Mauro*, 561 A.2d at 264-67; *Ayers*, 525 A.2d at 306-07; Ashton, *Decreasing the Risks Inherent in Claims for Increased Risk of Future Disease*, 43 U. MIAMI L. REV. 1081 (1989).

36. *Ayers*, 525 A.2d at 308-13 (reaching principled distinction between increased risk and medical surveillance recovery).

cancer, if and when it does develop.³⁷ Even if a plaintiff cannot establish that it is probable that he will get cancer, courts frequently hold that testimony about his increased risk is relevant in determining whether his fear of cancer is reasonable.³⁸

III. FEAR OF CANCER IS A CATEGORY OF EMOTIONAL DISTRESS

Read literally, fear of cancer is a relatively narrow term. However, in practice it is a shorthand phrase for the whole gamut of mental disturbances—anxiety, shock, depression, anguish, nervousness, as well as fear—which may arise out of apprehension about any future injury, illness, or bodily condition. Fear of cancer is thus simply a type of emotional,³⁹ distress a more familiar term. Because we evaluate toxicity of substances in terms of their cancer-causing potential, it is not surprising that the term fear of cancer has become widespread. The jury impact of “fear of cancer” as opposed to “emotional distress from apprehension of future disease” is obvious.

“Cancerphobia” is a term used by many courts and commentators interchangeably with fear of cancer.⁴⁰ However, other authorities distinguish the two, on several grounds. First, cancerphobia refers to an unreasonable fear that the individual knows is unreasonable,⁴¹ whereas fear of cancer generally applies to fears that are reasonable, a standard virtually every court requires.⁴² Second, cancerphobia refers to a recognized psychiatric illness that must be proved by expert testimony,⁴³ whereas fear of cancer does not require any certain proof other than the testimony of the plaintiff himself, although medical testimony is well-advised from a practical standpoint.⁴⁴ Cancer-phobia can be diagnosed using the criteria in *DSM III-R* pertaining to simple phobias.⁴⁵

A fundamental point about fear of cancer is that it can be an actionable harm giving rise to a cause of action, or it can be a type of damages.⁴⁶ The negligent infliction of emotional distress is the primary cause of action with which FTCA cases are concerned in the fear of cancer context.⁴⁷ When fear of cancer is a type of damages rather than a cause of action, it is commonly referred to as “parasitic” damages to the pain and suffering damages resulting from an actual physical injury.⁴⁸

37. See *supra* note 31.

38. See, e.g., *Farrall v. A.C. & S. Co., Inc.*, 558 A.2d 1078 (Del. Super. 1989).

39. See generally *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, 318 (5th Cir. 1986) (citing *Gale and Goyer, supra* note 6), *reconsidered*, and *reconsideration en banc denied*, 797 F.2d 256 (5th Cir. 1986); *Ayers*, 525 P.2d at 294-97 (viewing emotional distress symptoms of anxiety, stress, fear, and depression as “pain and suffering”).

40. See, e.g., *Willmore, In Fear of Cancerphobia*, 3 *Toxics L. Rep. (BNA)* 559 (Sept. 28, 1988).

41. *Lees-Haley, Cancerphobia and Fear of Future Illness*, 3 *Toxics L. Rep. (BNA)* 418 (Sept. 13, 1989).

42. See, e.g., *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219, 1228 (D.Mass. 1986).

43. See, e.g., *Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517, 526 n.13 (Fla. App.3 Dist. 1985), *review denied*, 492 So.2d 1331 (Fla. 1986).

44. See *Devlin v. Johns-Manville Sales Corp.*, 202 N.J. Super. 556, 495 A.2d 495, 499 (1985) (asbestos case).

45. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* sec. 300.29 at 243 (3d ed. revised 1987). See also *Lees-Haley, supra* note 41, at 418.

46. See generally *W. Prosser & W. Keeton, supra* note 7, sec. 54, at 363; *In re Moorenovich*, 634 F.Supp.634, 636 (D. Me. 1986) (allowing recovery for fear of cancer by asbestos workers; pointing out difference between cause of action and normal element of damages).

47. See *Gluckstern, supra* note 5, at 949; *Amendola v. Kansas City Southern Ry. Co.*, 699 F. Supp. 1401, 1408 (W.D. Mo. 1988) (Federal Employee's Liability Act asbestos case surveying common law, finding majority recognizes this tort).

48. See generally *Dworkin, supra* note 6, at 541; *RESTATEMENT (SECOND) OF TORTS*, section 905 (1965); Note, *Sterling v. Velsichol*, *supra* note 6, at 768-69. Cf. *French v. Ralph E. Moore, Inc.*, 661 P.2d 844 (Mont. 1983) (gasoline leached through soil; no physical injury required; awards of \$40,000 and \$15,000 to husband and wife for mental anguish; court piggybacks emotional distress claim to negligence claim for

A brief review of the law of emotional distress will assist in understanding fear of cancer.⁴⁹ Emotional distress is not a new concept, although it emerged in tort law later than other doctrines due to inability or reluctance of courts to recognize the mental aspects of injuries.⁵⁰ Emotional distress claims based on "fear of . . . (something)" are also not new.⁵¹

One 1958 case consistently cited in the 1980s toxic tort fear of cancer decisions is *Ferrara v. Galluchio*,⁵² where the plaintiff alleged "cancerophobia" [sic] in a medical malpractice setting. Mrs. Ferrara was negligently given too much X-ray therapy, causing a burned area on her shoulder that blistered and atrophied. Another physician later told her that the burned area might become cancerous, and that, therefore, she should have it checked regularly. Mrs. Ferrara developed a phobic apprehension that she would develop cancer, and sued in part for her mental suffering as well as the physical injury itself. The courts allowed recovery for the mental suffering, saying that there was a guarantee of the genuineness of the "cancerophobia" in the circumstances of the case, namely, the X-ray burn. The court felt that it was "entirely plausible, under such circumstances, that plaintiff would undergo exceptional mental suffering over the possibility of developing cancer."⁵³

The law of emotional distress liability and damages has been heavily influenced by a number of policy considerations.⁵⁴ These are worth setting forth together with their countervailing arguments, because such considerations continue to have an impact on virtually all toxic tort fear of cancer decisions.⁵⁵

The most often cited concern has always been that allowing recovery for emotional distress will open the floodgates of litigation.⁵⁶ This concern springs from even more fundamental ones: the difficulty of knowing what another person is thinking and feeling, and the consequent suspicion that a claim of mental distress can be faked.⁵⁷

The trend has been to realize that mental injuries can be just as severe and debilitating as physical injuries,⁵⁸ that mental pain can be as measurable, verifiable, and compensable

interference with use and enjoyment of land, making it seemingly parasitic to property damage rather than injury).

49. See generally RESTATEMENT (SECOND) OF TORTS § 436 (Physical Harm Resulting From Emotional Disturbance), 436 (A) (Negligence Resulting in Emotional Disturbance Alone), 456 (Emotional Disturbance Resulting From an Actionable Injury or the Conduct Which Caused It); W. PROSSER & W. KEETON, *supra* note 7, sec. 54, at 359, and sec. 12, at 54.

50. W. PROSSER & W. KEETON, *supra* note 7, sec. 54, at 359-66.

51. See, e.g., *Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517, 527 (Fla. App. 3 Dist. 1985), *review denied*, 492 So. 2d 1331 (Fla. 1986) (citing a 1912 case from North Carolina where plaintiff allowed to recover for mental suffering from a burn wound liable to lead to early cancer); Willmore, *supra* note 5, at 560; Dworkin, *supra* note 6, at 541-43 (common early cases involved fear of rabies from dog bites, where there was physical injury giving rise to fear, the fear was for a limited duration, and the damages were parasitic to the dog bite damages).

52. 152 N.E.2d 249 (N.Y. 1958).

53. *Id.* at 253.

54. W. PROSSER & W. KEETON, *supra* note 7, sec. 54 at 360-61 (cited frequently by courts and commentators, see, e.g., *Molien v. Kaiser Foundation Hospitals*, 27 Cal.3d 916, 167 Cal. Rptr. 831, 616 P.2d 813, 817 (1980) (plaintiff's wife erroneously advised she had syphilis, California allows negligent infliction of emotional distress unaccompanied by physical injury, policy discussion)); Willmore, *supra* note 5; Dworkin, *supra* note 6; comment b to RESTATEMENT (SECOND) OF TORTS 436 (A); see also *Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509, 519 (1970) (leading, frequently cited case involving flooding of plaintiffs' home).

55. See, e.g., *Eagle-Picher Industries*, 481 So.2d at 527; *In re Moorenovich*, 634 F. Supp. 634 (D. Me. 1986); Willmore, *supra* note 5 (arguing that with massive toxic tort litigation involving potentially huge numbers of plaintiffs, this concern is extremely valid). *Accord*, most asbestos cases cited *infra* notes 86-94 and accompanying text.

56. *Rodrigues*, 472 P.2d at 519; *Moorenovich*, 634 F. Supp. at 637.

57. *Molien*, 616 P.2d at 817-21; Willmore, *supra* note 5, at 563.

58. See, e.g., *Berman v. Allen*, 80 N.J. 421, 433, 404 A.2d 8, 14-15 (1979) (medical malpractice case where New Jersey accepted that "courts have come to recognize that mental and emotional distress is just as 'real' as physical pain, and that its valuation is no more difficult."), cited and applied in *Devlin v. Johns-*

as physical pain,⁵⁹ and that if litigation increases as a result of recognition of emotional distress claims, that is the price of effectuating one of the primary policies of the law — to remedy legitimate injuries.⁶⁰

As a result of these competing factors, courts have sought to impose requirements on emotional distress claims to improve the probability that only genuine claims would reach the jury.⁶¹ Originally, the primary means for achieving this was to require that there be an underlying physical injury that preceded the emotional harm.⁶² For instance, a person who suffered broken bones could also claim for ensuing emotional distress because the clear physical injury served to validate the claim. People were more inclined to believe that a person had suffered mentally when they could see a visible sign of a physical injury.⁶³

But there were still cases that seemed to warrant compensation even though there was no direct physical injury preceding the distress. The requirement of a physical "impact" in lieu of an "injury" evolved to address those cases.⁶⁴ Physical impact was generally defined as some contact between defendant and plaintiff, or between a force that defendant set in motion and plaintiff. In a toxic tort case, a Florida court described the state's impact rule as requiring that an external force, "no matter how large or small, visible or invisible, and no matter that the effects are not immediately deleterious, touch or enter into the plaintiff's body."⁶⁵

As time went by, the physical injury requirement was revised significantly when courts began to allow the required physical harm to manifest itself after the mental distress. In other words, the physical injury no longer had to precede and cause the mental injury; the process could be reversed, so long as there was some objective manifestation of the mental distress.⁶⁶ This expansion of the way in which the physical injury or harm requirement could be satisfied was very important for later toxic tort cases.⁶⁷ Another highly significant factor was the growing recognition that the line between mental and physical harm was not at all precise.⁶⁸

The bystander cases, led by the influential California case of *Dillon v. Legg*,⁶⁹ further expanded the avenues of recovery for emotional distress, by permitting persons who

Mansville Sales Corp., 202 N.J. Super. 556, 558, 495 A.2d 495, 497, (1985) (asbestos case).

59. See, e.g., Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922).

60. W. PROSSER & W. KEETON, *supra*, note 7, sec. 54, at 360; *People Express Airlines v. Consolidated Rail Corp.*, 495 A.2d 107, 110 (N.J. 1985) (citing emotional distress cases) "We have subordinated the threat of potential baseless claims to the right of an aggrieved individual to pursue a just and fair claim for redress attributable to the wrongdoing of another."

61. See, e.g., *Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171, 175, 178-80 (1982) (a leading, frequently cited, case involving DES which denies recovery for fear of cancer absent physical harm, discussing policy considerations).

62. *Id.* For a review of the progress of emotional distress law in one state—New Jersey—see Note, *Recovery Denied for Unquantified "Enhanced Risk" of Disease Under New Jersey Tort Claims Act and Prospective Application of a Court-Supervised Fund for Medical Surveillance Compensation Required*, 19 SETON HALL L. REV. 272, 281-85 (1989).

63. See, e.g., Willmore, *supra* note 5, at 563.

64. See, e.g., Note, *Sterling v. Velsicol*..., *supra* note 6, at 771-73; *Bass v. Nooney Co.*, 646 S.W.2d 765, 768-72 (Mo. banc 1983) and cases cited therein (elevator passenger sued for emotional distress because trapped in stalled elevator; Missouri discards injury requirement; comprehensive review of development of emotional distress law in negligence cases, though seems to mix concepts of injury and impact).

65. *Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517, 527 (Fla. App. Dist. 1985), *review denied*, 492 So.2d 1331 (Fla. 1986).

66. See Dworkin, *supra* note 6, at 532 (Dworkin sees the progression as abandoning injury in favor of a physical manifestation of the distress).

67. *Amendola v. Kansas City Southern Ry. Co.*, 699 F.Supp. 1401, 1410-11 (W.D. Mo. 1988) (Federal Employee's Liability Act asbestos case without physical injury, surveying common law).

68. RESTATEMENT (SECOND) OF TORTS, § 436(A), comment c (1965) (a very important and influential passage); *Molien*, 616 P.2d at 817, 820-21.

69. 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912 (1968).

had witnessed a traumatic physical injury to someone with whom they had a close relationship to recover for emotional distress, provided they had been in the foreseeable zone of danger. Variations of the foreseeability/zone of danger test eventually found their way into nonbystander cases, including some toxic torts.⁷⁰

In an even more liberal treatment of the subject, some states began to allow claims for emotional distress even though there was no physical injury of impact.⁷¹ These jurisdictions did impose other standards to help ensure genuineness of the claim, such as requirements that the emotional distress be severe and that it be foreseeable.

IV. GENERAL APPROACHES TO FEAR OF CANCER IN TOXIC TORT CASES

In some states, fear of cancer claims in toxic tort cases have spurred liberalization of emotional distress law. It is often said, however, that most states have stood fast to the traditional rule requiring physical injury, either causing or caused by the emotional distress.⁷² Ascertaining a true majority view on this subject is difficult, however, because one finds many different definitions of "injury," "impact," and "harm," under the so-called majority rule,⁷³ as well as varying additional requirements.⁷⁴ Moreover, it seems the cases claiming to set forth the majority view tend to cite Prosser and some earlier toxic tort cases, and do not necessarily encompass the most recent developments. In general, the approaches vary from relatively stringent definitions of injury, to cases that liberally define injury to cases in which the courts have done away with any injury requirement at all and have substituted their own tests.

To the extent any summary of the approaches can be constructed, it looks like this:⁷⁵

- (1) Most courts require physical injury or impact, with one or more of the following qualifications additions, or modifications:
 - (a) the injury causes, or is caused by, the emotional distress;⁷⁶
 - (b) the injury must be specific and usually more serious or permanent than the common symptoms of headache, nausea, and vomiting;⁷⁷

70. See, e.g., *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 867 (Mo. App. 1985), cert. denied, 476 U.S. 1176, 90 L.Ed.2d 989, 106 S.Ct. 2903 (1986) (exposure to radioactive emissions without injury).

71. *Molien v. Kaiser Foundation Hospitals*, 27 Cal.3d 916, 167 Cal.Rptr. 831, 616 P.2d 813 (1980); *Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509 (1970).

72. See, e.g., *Amendola v. Kansas City Southern Ry. Co.*, 699 F.Supp. 1401, 1410-11 (W.D. Mo. 1988) (Federal Employee's Liability Act asbestos case surveying common law, concluding physical harm requirement, either as precondition or result of emotional distress, is majority view); *DeStorres v. City of Phoenix*, 154 Ariz. 604, 744 P.2d 705 (App. 1987) ("the great majority of courts hold that there can be no recovery for mental disturbance unless physical injury, illness, or other consequence accompany it, or physical harm develops as a result of the plaintiff's emotional distress [citing Prosser]...toxic substance cases are in general harmony with the rule that damages may not be recovered for mental anguish absent proof of some present physical harm or medically identifiable effect," *Id.*, at 709, 710, and holding that construction workers at Phoenix airport who inhaled asbestos particles had not suffered the required physical injury as mere ingestion was not sufficient).

73. See, e.g., *Wells v. Ortho Pharmaceutical Corp.*, 615 F.Supp. 262, 297 (D.C. Ga. 1985) (injury under Georgia law defined essentially as impact).

74. For instance, *Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (1982) is a leading, frequently cited, case involving DES which denies recovery for fear of cancer absent physical harm, but which also adds other requirements "majority" states do not have.

75. Cf., Note, *Sterling v. Velsicol*..., *supra* note 6, at 768-73; Annotation, *supra* note 7, section 2, at 25.

76. See, e.g., *Payton*, 437 N.E.2d at 178-80.

77. See, e.g., *Burns v. Jaquays Mining Corp.*, 156 Ariz. 375, 752 P.2d 28 (App. 1987), review dismissed,

- (c) if the jurisdiction allows either impact or injury to satisfy its requirements, and physical impact occurs, injury need not be analyzed because the lesser standard of impact has been met;⁷⁸
 - (d) injury or impact requirements can be satisfied by fairly insubstantial events, such as mere ingestion of the chemical, or exposure to it in some form;⁷⁹
 - (e) in addition to an injury or impact requirement, one or more of the factors in (2) below is required.⁸⁰
- (2) Some courts discard the injury-impact requirement in favor of their own tests. Those tests generally require one or more of the following guarantees of genuineness:
- (a) the emotional distress is foreseeable;⁸¹
 - (b) the emotional distress is causally related to defendant's negligence;⁸²
 - (c) the emotional distress is serious, or medically diagnosable and medically significant, or manifested by objective symptomatology;⁸³
 - (d) the emotional distress is reasonable;⁸⁴
 - (e) the substance is a human carcinogen.⁸⁵

It often seems as though the type of substance to which plaintiff was exposed shapes the course of the law in this area. The asbestos cases are a good example of this phenomenon and the varying approaches listed above. One characteristic of asbestos is that it can cause the readily identifiable disease of asbestosis (scarring of the lungs) as well as various types of cancer, including mesothelioma (and other health problems such as heart disease and thickening of the membranes of the lung). However, asbestosis does not necessarily result in asbestos-related cancer.⁸⁶ The presence of asbestosis makes it easy for a court that adheres to the strict physical injury standard to permit recovery for fear of cancer even though there are no present symptoms of cancer or physical manifestations of the fear.⁸⁷ In contrast, plaintiffs who

162 Ariz. 186, 781 P.2d 1373 (1989); cf. *Boyd v. Orkin Exterminating Co., Inc.*, 191 Ga.App. 38, 381 S.E.2d 295 (1989) (Georgia "increased risk of cancer" case holding elevated pesticide levels in children's blood was not an injury).

78. A self-evident proposition.

79. *Wetherill v. University of Chicago*, 565 F. Supp. 1553 (N.D. Ill. 1983); *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431 (Tenn. 1982), both discussed *infra*; *Stites v. Sundstrand Heat Transfer, Inc.*, 660 F. Supp. 1516, 1527-27 (W.D. Mich. 1987) (Michigan courts very lenient in finding allegations of physical harm sufficient, although general claims of physical distress, pain and suffering will not suffice).

80. *Payton*, 437 N.E.2d at 181 (requiring causation, manifestation via objective symptomatology, reasonableness, in addition to physical harm); *Arnett v. Dow Chemical Co.*, No. 729586, Calif. Super. Ct. (Mar. 21, 1983) (discussed *infra* notes 128-30 and accompanying text).

81. *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 867 (Mo. App. 1985), cert. denied, 476 U.S. 1176, 90 L.Ed.2d 989, 106 S.Ct. 2903 (1986) (plaintiffs need only to plead defendants' conduct "involved an unreasonable risk of causing plaintiffs' emotional distress and the distress is medically diagnosable and medically significant").

82. See, e.g., *Payton*, 473 N.E.2d at 818.

83. *Bennett*, 698 S.W.2d 854.

84. Determined by an objective standard, see, e.g., *Farrall v. A.C. & S. Co., Inc.*, 558 A.2d 1078, 1080 (Del. Super. 1989) (asbestos case rejecting defendants' argument that fear is to be judged focusing only on plaintiff).

85. See *infra* notes 164-69 and accompanying text.

86. See *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 517 (5th Cir. 1984).

87. *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 414 (5th Cir. 1986) (applying Mississippi law which allows recovery for negligent infliction of "mental pain and suffering" where accompanied by

have been exposed to other substances often cannot point to a current intermediate disease such as asbestosis that would satisfy the injury requirement.

One asbestos case, *Eagle-Picher Industries, Inc. v. Cox*,⁸⁸ discussed the impact rule of Florida and found that a physical injury requirement (satisfied by asbestosis), was necessary to ensure that only genuine claims were submitted and that the floodgates of litigation were kept closed.⁸⁹ The court noted that mere inhalation of asbestos would satisfy the impact rule;⁹⁰ however, the court was not willing to allow recovery for that type of simple exposure. The court viewed asbestosis as a good screening device because it had been associated with an increased risk of cancer, and, therefore, plaintiffs with it had a validly greater reason to fear cancer.

In asbestos cases where plaintiffs have not had asbestosis at the time of suit, most courts have similarly rejected fear of cancer claims.⁹¹ In a case⁹² involving exposure by trailer park residents to asbestos fibers from defendant's mining operation, plaintiffs who did not presently have asbestosis alleged injuries in the form of headaches, acid indigestion, weeping, muscle spasms, depression, and insomnia. Although the court acknowledged that some of the plaintiffs would eventually suffer from asbestosis and other asbestos-related diseases, it was unwilling to view the alleged injuries as the type of bodily harm that would sustain a cause of action for emotional distress. It called the injuries "psychosomatic" and "transitory physical phenomena."⁹³

One asbestos case that applied Maine law rejected the injury-impact requirement in favor of a foreseeability test, because Maine law had already moved in that direction. *In re Moorenovich*,⁹⁴ involved employees who were merely exposed to asbestos, though the exposure was prolonged and co-workers were dying at a higher rate than normal due to asbestos-related cancer. Citing a Maine bystander emotional distress case that had adopted a foreseeability test, the court found that injury was not required. It did not address whether the lesser standard of impact was required, either. Instead, the court adopted approach (2) above, creating this simply stated test: "any anxiety must have been proximately caused by plaintiff's exposure to asbestos. Moreover, the anxiety must be reasonable. Finally, defendant must be legally responsible for plaintiff's exposure."⁹⁵ The latter requirement clearly refers to a foreseeability-duty analysis.

In cases involving other types of substances, the results have been less clear-cut, although groundwater contamination cases seem to have generated the most noticeable

physical or bodily injury, and not otherwise); cf. *Herber v. Johns-Manville Corp.*, 785 F.2d 79 (3d Cir. 1986) (no asbestosis, but pleural-lung membrane thickening qualified as an injury under New Jersey law, because only slight injury necessary there); *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1138 (5th Cir. 1985) (applying Texas law which requires actual physical injury); but cf. *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985) (holding that injury consisting of accumulation of asbestos fibers in the lungs is sufficient, also applying Texas law).

88. 481 S.2d 517 (Fla. App. 3 Dist. 1985), review denied, 492 So.2d 1331 (Fla. 1986).

89. *Id.* at 529.

90. *Id.* at 527.

91. *DeStories v. City of Phoenix*, 154 Ariz. 604, 744 P.2d 705 (App. 1987) (holding that construction workers at Phoenix airport who inhaled asbestos particles had not suffered the required physical injury as mere ingestion was not sufficient); cf. *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271 (3d Cir. 1985) (wives and children of asbestos workers who died sued for emotional distress due to fear of contracting cancer from exposure to asbestos dust contained on husband-fathers' clothing, alleging headaches: held not actionable unless some physical injury or some medically identifiable effect linked to asbestos exposure, applying Pennsylvania law); *Amendola v. Kansas City Southern Ry. Co.*, 699 F. Supp. 1401, 1409 (W.D. Mo. 1988) (Federal Employee's Liability Act asbestos case surveying common law, requiring emotional distress accompanied by physical harm).

92. *Burns v. Jaquays Mining Corp.*, 156 Ariz. 375, 752 P.2d 28 (App. 1987), review dismissed, 162 Ariz. 186, 781 P.2d 1373 (1989).

93. *Id.* at 32 (also citing comment (c) to RESTATEMENT (SECOND) OF TORTS, sec. 436 (A)).

94. 634 F.Supp. 634 (D. Me. 1986).

95. *Id.* at 637.

movement towards allowing the mere exposure or ingestion of a chemical to support a claim for emotional distress. In *Merry v. Westinghouse Electric Corp.*,⁹⁶ plaintiffs' wells were contaminated by chlorinated hydrocarbons, and they claimed for emotional distress. The court pointed out that Pennsylvania law allowed recovery for emotional distress when it was the result of: "(1) physical injury; (2) physical impact; (3) location within the zone of danger; or (4) witnessing a traumatizing event involving a close relative."⁹⁷ Then the court went on to say:

Westinghouse argues that the plaintiffs have not presented proper proof of impact since they have not presented any medical evidence of the retention of chemicals in their bodies or the impingement of chemical particles on any internal organ. Those arguments are not well taken . . . It reasonably can be inferred, from the fact that the plaintiffs' wells are contaminated, that the plaintiffs have inhaled, ingested and absorbed the hazardous materials found in the wells. The plaintiffs' experts opine that although the effects of the exposures may be undetectable for long periods of time, the plaintiffs have suffered a present physical effect as a result. Furthermore, there is evidence that certain plaintiffs have demonstrated acute physical symptoms of exposure to the chemicals.⁹⁸

Should this case be interpreted for the proposition that mere ingestion is sufficient to establish physical impact? Other language in the opinion seemed to suggest that interpretation, but in light of the last sentence of the above quote it is unclear whether the fact of acute symptoms is determinative, or whether the court is also holding that mere ingestion is enough even without a physical manifestation.⁹⁹ If the former, the decision in effect simply is following the traditional rule requiring physical injury which either causes or is caused by exposure.

Other cases more clearly establish that ingestion or exposure without more is enough,¹⁰⁰ while at the same time they redefine injury-impact or do away with it altogether. In a diethylstilbestrol (DES) case, *Wetherill v. University of Chicago*,¹⁰¹ plaintiffs claimed that their prenatal exposure to DES enhanced their risk of contracting cancer, but sued for damages for fear of developing cancer, rather than the enhanced risk itself. The court held that Illinois law required proof of a causal link between the fear of future injury and the physical impact (as distinguished from injury) of defendant's conduct. The court found that the plaintiffs' prenatal exposure to DES, without more, satisfied the physical impact requirements.¹⁰² The court also found the plaintiffs' anxieties to be reasonable in that studies showed DES could cause cancer and there had been much publicity that could engender valid fears.

Hagerty v. L & L Marine Services, Inc.,¹⁰³ is frequently cited for the proposition that mere exposure is enough to support a fear of cancer claim. In a federal case applying a federal statute (the Jones Act),¹⁰⁴ the court considered whether a barge tankerman

96. 684 F. Supp. 847 (M.D. Pa. 1988).

97. *Id.* at 852 (seemingly mixing concepts of bystander and non-bystander cases).

98. *Id.*

99. Other Pennsylvania cases would contradict a mere ingestion interpretation. See *Bubash v. Philadelphia Electric Co.*, No. 88-1444 (M.D. Pa., Aug. 17, 1989) (dismissing fear of cancer claim by plaintiff who alleged exposure to radiation at a nuclear power plant; without anything more, court held no injury), as reported in 3 *Toxics L.Rep. (BNA)* 344 (Aug. 30, 1989); *Houston v. Texaco*, 538 A.2d 502 (Pa. Super. 1988) (plaintiffs who alleged they were upset and bitter over a gas leak that contaminated their water, but who had not become ill, could not recover for emotional distress).

100. See *Sterling v. Velsicol Chemical Corp.*, (discussed *infra* notes and accompanying text).

101. 565 F.Supp. 1553 (1983) (applying Illinois law).

102. *Id.* at 1560.

103. 788 F.2d 315 (5th Cir. 1986), *reconsidered*, and *reconsideration en banc denied*, 797 F.2d 256 (5th Cir. 1986). *compare*, *Harper v. Illinois Central Gulf Railroad*, 808 F.2d 1139 (5th Cir. 1987) (without exposure to chemicals when train derailed, plaintiffs had to show they were within the zone of danger and their fears were reasonable).

104. 46 U.S.C. § 688.

could recover for fear of cancer after being accidentally drenched with benzene, toluene, and xylene. The man did not have cancer at present nor any symptoms related to it, but he had felt physical effects right after the dousing, and he had some knowledge of the carcinogenic qualities of the chemicals. Additionally, he had been warned by a doctor to be regularly tested for cancer. The court held that:

With or without physical injury or impact, a plaintiff is entitled to recover damages for serious mental distress arising from developing fear of cancer where his fear is reasonable and causally related to the defendant's negligence. The circumstances surrounding the fear-inducing occurrence may themselves supply sufficient indicia of genuineness.¹⁰⁵

On reconsideration, the court clarified what it meant by "with or without physical injury," stating that it still assumed an actionable injury, but rendering no opinion as to the nature of the injury required.¹⁰⁶ This supposed clarification is more confusing than helpful. The precedential value of *Hagerty* in terms of obviating the physical injury requirement is questionable in light of the fact that this plaintiff's entire body was soaked in carcinogenic substances, an event that would seem to be a substantial one-time impact of the type that has frequently been viewed as sufficient for a claim of emotional distress.

The cases may create more confusion than enlightenment, but that is because of the various ways that injury or impact are defined. The decisions that do away with injury-impact do a service in terms of clarifying this area, but it would be incorrect to think that a more "modern" test that relies on foreseeability, reasonableness, seriousness, or other factors is necessarily more expansive for plaintiffs.

V. MERE INGESTION OR EXPOSURE - APPLIED IN *CLARK*

In the *Clark* case, however, the newer formulations were applied expansively. The development of emotional distress law in the State of Washington, and its application in *Clark*, illustrate the viewpoint that mere ingestion is sufficient.

Actually, a Hawaii Supreme Court case heavily influenced Washington law in this direction. In *Rodrigues v. State*,¹⁰⁷ the Hawaii court addressed the issue of whether plaintiffs could recover for their mental anguish caused by the flooding of their home after heavy rains, when the highway department had been negligent in not promptly clearing a culvert to prevent the flood. The court reviewed the development of the law of emotional distress, beginning with language in the earliest cases that held there was no duty to refrain from the negligent infliction of emotional distress, but noting that where genuine and serious mental distress existed, courts created exceptions to the early rule of no liability. The court then determined that rather than the standard physical injury or impact tests that had grown out of the exceptions, the "preferable approach is to adopt general standards to test the genuineness and seriousness of mental distress in any particular case."¹⁰⁸

After rejecting the "floodgates of litigation" policy, the Hawaii court held that "serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case,"¹⁰⁹ that general tort principles should be applied to this kind of case, and that there

105. 788 F.2d at 317.

106. 797 F.2d at 256.

107. 52 Haw. 156, 472 P.2d 509 (1970).

108. *Id.* at 519.

109. *Id.* at 520.

had to be a showing that "serious mental distress to the plaintiff was a reasonably foreseeable consequence of the defendant's act."¹¹⁰ The court expressed its faith in the superior ability of the jury, as a cross-section of the community, to consider mental distress claims vis-a-vis the court.

Rodrigues was persuasive for the Washington Supreme Court when it considered *Hunsley v. Giard*,¹¹¹ a leading case wherein a woman had driven her car into her neighbor's house. Mrs. Hunsley had been in her living room when Mrs. Giard crashed into her back porch. Hunsley alleged emotional distress and heart damage resulting from the shock of the crash ("heart stress," as evidenced by medical testimony interpreting abnormal electrocardiograms). Thus, there were "physical symptoms evidencing and resulting from the emotional distress . . . [which meant] [w]hether there is liability for emotional distress unmanifested by any physical symptoms must be determined in another case."¹¹²

Notwithstanding the above qualification, the court went on to say that negligent infliction of emotional distress is a cause of action even if there is "no physical impact [or] . . . threat of immediate physical invasion of the plaintiff's personal security,"¹¹³ and adopted the "reaction of a reasonable person" and "foreseeability of the fear" requirements of *Rodrigues*.¹¹⁴ The court further stated that the mental suffering had to be "manifested by objective symptomatology,"¹¹⁵ without further definition of what the phrase meant. The case has since been interpreted to mean that Washington law allows recovery for emotional distress even without physical injury, although the court never expressly said that, using the term "physical impact" instead. Because the general rule in other jurisdictions by this time was to allow recovery even where physical injury occurred after and as a result of emotional distress, and that was what happened with Mrs. Hunsley, there did not seem to be any need to alter that rule to decide the case. Interestingly, the court did not expressly adopt the *Rodrigues* standard that the emotional distress had to be *serious*, although one might argue that is included within the requirement of objective symptomatology.

The requirements of foreseeability, reasonable reaction, and objective symptomatology from *Hunsley* were considered in a later groundwater contamination case, *Wilson v. Key Tronic* [sic] *Corp.*,¹¹⁶ where landfill chemicals had contaminated nearby residents' wells and plaintiffs alleged nuisance rather than negligence. The court held that: "Fears of present and future health problems stemming from actual ingestion of the chemical by family members are not remote and fanciful, but rather are reasonable and compensable."¹¹⁷ In actuality, the court's ruling in *Key Tronic* was not premised so much on *Hunsley* as on several other Washington cases where pollution of a household water supply was considered to be a physical invasion of the person, satisfying a direct physical invasion test which had been developed in several *pre-Hunsley* cases,¹¹⁸ and cited in *Hunsley*. The court also believed the *Hunsley* criteria were met. The upshot of *Key Tronic* was that the

110. *Id.* at 521.

111. 87 Wash.2d 424, 553 P.2d 1096 (1976).

112. 553 P.2d at 1102.

113. *Id.* at 1102.

114. *Id.* at 1102-03.

115. *Id.* at 1103.

116. 701 P.2d 518 (Wash. App. 1985).

117. *Id.* at 524.

118. *Id.* at 524 and these cases cited therein: *Murphy v. Tacoma*, 60 Wash. 2d 603, 374 P.2d 976 (1962); *Drake v. Smith*, 54 Wash.2d 57, 337 P.2d 1059 (1959). The court's interpretation of these cases seems suspect, in that *Murphy* was an intentional tort case and *Drake* was not an emotional distress case (it allowed inconvenience damages for hauling water).

plaintiff's drinking of the contaminated water was enough to support a finding of emotional distress. The court, citing another previous case,¹¹⁹ even indicated that the threat of contaminated water in the house, without ingestion, would be sufficient for a fear of future illness claim.

A federal case from the same district as *Clark* interpreted *Hunsley* and *Key Tronic*, but as with *Key Tronic*, it was a nuisance case. *Bradley v. American Smelting & Refining Co.*¹²⁰ involved plaintiffs who alleged emotional distress from the deposit of arsenic and cadmium particles on their land from the defendant's copper smelter four miles away. The court held that mental distress in nuisance was compensable only if manifested by physical symptoms (citing *Hunsley*) or if accompanied by an actual or threatened invasion of the plaintiff's person or security (citing *Key Tronic*). Plaintiffs could not prove that the particles caused any injury or physical discomfort, or even any actual health risk, though the particles were present in their soil in higher quantities than normal. The court granted defendant's motion for summary judgment, stating: "It is also clear there has been no invasion or threatened invasion of plaintiff's security because, as the court has determined, the evidence indicates no health risk."¹²¹ In other words, the existence of a health risk was determinative of whether there was an actionable harm. Without a health risk, the plaintiffs' mere exposure to the particles in their soil and their resultant anxiety did not equate to actionable harm.

With the law in Washington in this posture, plaintiffs approached trial in *Clark* with a greater opportunity to win an emotional distress award than in other states, if they could minimize *Bradley* and emphasize *Key Tronic*. The following issues relating to emotional distress¹²² were contested by both sides during the trial and on appeal: (1) whether the claim was permitted under Washington law; (2) whether the distress was foreseeable by the Air Force; (3) whether there was objective symptomatology; (4) whether the distress was serious; (5) when the distress began and ended; and (6) whether the distress was reasonable.

Further facts concerning these issues were as follows. In December 1982 or January 1983, Mary Clark had wondered whether something was wrong with her water and requested that it be tested. The county health department asked the EPA to test, which it did, after first warning Mary Clark and the others not to drink the water while the test results were pending. The testing was done in March 1983 for Mary Clark's property, and by May 1983 for the other plaintiffs. Plaintiffs Mary Clark and the Nojds were told by the county health department that¹²³ the tests showed the level of TCE in their water exceeded the health department's action levels and the EPA-recommended maximum level (which was cautiously pegged at zero), but the risk of contracting cancer from the chemicals was approximately one in a million, and that was roughly equivalent to the risk of having a serious traffic accident while driving to Seattle and back (two hours round trip by interstate freeway).¹²⁴ Although no other health concern was ever related to the plaintiffs, the department still recommended that they not use the water.

119. *McRae v. Bolstad*, 32 Wash. App. 173, 646 P.2d 771 (1982), *aff'd on other grounds*, 101 Wash. 2d 161, 676 P.2d 496 (1984).

120. 635 F. Supp. 1154 (W.D. Wash. 1986).

121. 635 F. Supp. at 1158.

122. The Air Force called it a fear of cancer case while the plaintiffs insisted it was an emotional distress case. Terming the case a literal fear of cancer decision may not be entirely accurate, since the court used the term emotional distress throughout rather than fear of cancer. However, it was clear from the evidence at trial that the only risk to health at issue was that of cancer. The only health problem from TCE or DCE exposure which was ever discussed by the court was cancer. In actuality, it was fear of cancer emotional distress case. See Appellees' Brief at 9; Appellant's Reply Brief at 2-3.

123. *Clark Record*, at 72, 79, 1533-36.

124. *Id.* at 87, 1529.

After this notice, Mary Clark and her family ceased using the water. The other plaintiffs stopped drinking it, but sometimes used it for quick showers and washing dishes.¹²⁵ All the plaintiffs immediately began hauling drinking water from other sources. After they had been hauling for about a year, the Air Force began to supply bottled water. Bottled water was provided from spring 1984 to summer 1986, when the plaintiffs were connected to the local water supply at DOD expense.¹²⁶ Trial was held in 1987, with the decision rendered by the court in April.

The overall issue of whether Washington law permitted the claims for emotional distress was resolved in plaintiffs' favor, but the court's interpretation of *Hunsley v. Giard, Wilson v. Key Tronic Corp.*, and related cases, is by no means clear. The court's discussion comes during the oral opinion, and is not precise. The court appears to hold that "the actual invasion of the bodies of the plaintiffs based on consumption of the water"¹²⁷ satisfies *Key Tronic*, even without physical injury. The Government, contending that *Key Tronic* was not on point because it was a nuisance case involving extrahazardous waste,¹²⁸ and arguing that no Washington case had decided the precise issue, had urged the court to adopt the standard set out in an unreported California case, *Arnett v. Dow Chemical Co.*¹²⁹

Arnett had been cited with favor by several state courts in related cases.¹³⁰ It was a case where workers were exposed to a liquid pesticide known as DBCP which caused testicular injury to animals, and which was alleged to have caused low or no sperm count for the workers. The *Arnett* court held that where there was accompanying physical injury, a four-part test had to be met to claim emotional distress for fear of developing cancer: (1) the fear of cancer must be serious, (2) the fear must be caused by exposure to the chemical, (3) the fear of contracting cancer because of the exposure must be reasonable, and (4) the defendant is legally responsible for the exposure because the mental distress was foreseeable.¹³¹ Except for the seriousness prong, the *Clark* court did eventually address the same elements as the *Arnett* test in one way or another, though not explicitly. The precise legal path it took is simply not clear from its opinion.

With regard to whether the Air Force could have foreseen the emotional distress its waste disposal practices engendered, the court concluded that it could have, generally rather than specifically.¹³² The qualification of general foreseeability was necessary because, as the evidence showed, when the wastes were disposed of in the 1950s and 1960s, no one knew that TCE might be carcinogenic. The most that could be said was that people knew in those days that exposure to TCE at high levels could cause general health problems. Low-level exposure knowledge did not exist. The Government argued that plaintiffs had to show that the Air Force could have foreseen that TCE would appear in their wells, and that they would suffer emotional distress from the presence of TCE at levels that were not harmful.¹³³

It is clear that when the Air Force was siting and using the disposal area, the government could not have foreseen that one of the chemicals being disposed of would later be judged to be a

125. 660 F. Supp. at 1171.

126. DOD spent \$2.5 million connecting the *Clark* plaintiffs to the public water supply in 1986.

127. *Id.* at 1197.

128. Appellant's Reply Brief at 7-8.

129. No. 729586 Cal. Super. Ct. (Mar. 21, 1983). See Defendant's Trial Brief at 69.

130. *Devlin v. Johns-Manville*, 202 N.J. Super. Ct. 556, 495 A.2d 495 (1985) (holding that *Arnett* standard would prevent speculative claims).

131. *Arnett*, slip op. at 73.

132. *Id.* at 1175, 1197.

133. Defendant's Trial Brief at 78-80.

'probable human carcinogen' and thus would be capable of frightening people living near the disposal area.¹³⁴

"In fact, it is hard to imagine a less foreseeable risk than where the risk had not been discovered at the time of the tort."¹³⁵

Plaintiffs responded that the Government was attempting to graft a second-tier foreseeability test onto the court's finding that it was foreseeable that the siting and operation of the landfill could result in contamination of the wells and injury to plaintiffs.¹³⁶ In other words, the argument was that the Air Force did not have to foresee the exact manner of the harm, only its general nature, and that because TCE health hazards other than cancer had been clearly known even years ago, emotional distress was foreseeable. Without analysis, the court elected to adopt this broader approach.

The court found that the emotional distress began when the plaintiffs were told not to drink the water and that it was dangerous.¹³⁷ The Government argued to no avail that the plaintiffs had never been told the water was dangerous, in that being told of a one in one million risk did not amount to such advice. The court found that the actual risk was no greater than one in a million, was "probably much less, and may be zero."¹³⁸ Nevertheless, the court felt that the plaintiffs perceived greater risks, and that emotional distress flowing from those perceptions continued through trial and would probably continue for an undefinable although short period after trial. The court commented that: "[N]ow we have been to court and the plaintiffs have all heard from the experts what the risks really are and they should realize that the risks are so slight as to not merit further worry or concern."¹³⁹ That comment by the court might lead one to wonder about several things, including why the plaintiffs had not realized the absence of risk sooner and why emotional distress would continue even after trial once they were undeniably aware of the actually minimal risk.

The provision of bottled water followed by hook-up to the local water supply apparently had no effect in the court's decision on reducing the overall amount of plaintiffs' distress. While lingering concern over the effects of past exposure (disregarding the information about the actual risk) might be understandable, at least worry and anxiety about any continuing exposure should have been eliminated.

What exactly were the plaintiffs' complaints of emotional distress, and how serious were they? The *Clark* court found that there was objective symptomatology, but it did not specify what it was. The parties' appellate briefs and the record of trial reveal the following complaints, however: sleeplessness, weight loss (for some), weight gain (for others), increased irritability, increased cigarette smoking, and anxiety over one's health and the health of other plaintiffs.¹⁴⁰ On their face, these complaints hardly seem serious, and indeed, there is no finding by the court one way or the other as to seriousness.

The closest the court comes to discussing the magnitude of plaintiffs' reactions is a finding that the "reactions were those of reasonable people similarly situated and normally constituted,"¹⁴¹ even though some of their fear was not justified.¹⁴² The

134. Appellant's Opening Brief at 14 (footnote omitted).

135. *Id.* at 15.

136. Appellee's Brief, at 16.

137. *Id.* at 1196.

138. *Id.* at 1175.

139. *Id.* at 1200. See also *id.* at 1175.

140 Appellant's Opening Brief at 11, *Clark*, 856 F.2d 1433 (9th Cir. 1988); Record at 1017, 1025, 1038, 1041, 1051, 1060, 1071, 1134, 660 F. Supp. 1164.

141. 660 F. Supp. at 1175.

142. *Id.* at 1196.

Government pointed out, and the court acknowledged, that there were other causes for the plaintiffs' anxieties, in addition to the contamination of the water. For instance, the court spoke of the following factors contributing to the distress of one or more plaintiffs: plaintiffs' other health problems, combined with their age (Mary Clark was 60), the difficulties of growing up (for the two younger plaintiffs), prior disputes some of them had with the Air Force, financial problems, substance abuse, stress caused by retirement, the litigation itself, and other "emotional baggage" they carried into the case with them (for instance, Mary Clark's husband had died of stomach cancer in 1971, an event she attributed to the water once she learned of the TCE).¹⁴³ The court did indicate that the Government was not responsible for these other problems that had contributed to the stress, and that it would adjust damages accordingly. As one can imagine, any attempt to separate the effect of these other factors from the effect of the contamination factor is necessarily subjective, lending credence to the underlying concern courts have in emotional distress cases of how to ascertain and measure damages.

As with the "objective symptoms," the court did not specify exactly how the plaintiffs' reactions were those of normally constituted persons. On appeal, the Government argued that the cancer risk of one in a million (known to the plaintiffs from 1983 on) was insufficient to cause a reasonable person to have serious concern. "If plaintiffs chose to ignore the risk assessment given to them and invent a more frightening prognosis, then they were reacting unreasonably."¹⁴⁴ Unfortunately, the appellate court did not respond to that argument. The trial court did point out in its oral opinion that the primary cause of plaintiffs' fear was the unknown, because the Government's risk assessment dealt with probabilities, rather than certainties.¹⁴⁵ But under such reasoning, reasonable people will be entitled to overreact and fear the worst unless experts can definitely say there are no risks. Although one of plaintiffs, Mr. Gravatt, had apparently put the matter behind him, his lesser reaction did not indicate that that was the norm or that the others did not react as normal people.¹⁴⁶

In addition, the Government argued the paradox that plaintiffs who were regular long-term cigarette smokers should be emotionally stressed by the lesser risk of TCE, contending such a reaction was not reasonable.¹⁴⁷ Plaintiffs argued that comparisons of risks were inappropriate,¹⁴⁸ and cited *Key Tronic's* comment that fears about ingestion of chemicals are reasonable.

In the end, the court awarded a total of \$173,202 damages to the nine plaintiffs, \$83,000 of that amount consisting of damages for emotional distress. While the total amount of damages is not shocking, anything for emotional distress is surprising, in light of the minimal "objective symptoms," and the difficulty any defendant would have had twenty years ago in foreseeing this type of liability for mere ingestion.¹⁴⁹

VI. RECENT DEVELOPMENTS

A 1988 Tennessee landfill-groundwater contamination case is an excellent example of how appellate courts struggle to accommodate fear of cancer claims yet rein in

143. *Id.* at 1199-1200.

144. Appellant's Opening Brief at 12, *Clark*, 856 F.2d 1433 (9th Cir. 1988).

145. 660 F. Supp. at 1200.

146. *Id.* at 1197.

147. Defendant's Trial Brief at 76-77; Appellant's Opening Brief at 11.

148. A common trial defense tactic, see generally Munter and DeVries, *Higgins v. Aerojet Corporation: Successfully Defending a Toxic Tort Case*, 1 *Toxics L. Rep.* (BNA) 874 (Jan. 14, 1987) (excellent practical tips for trial preparation); *Errors by Judge Alleged in Motion by Plaintiffs for New Aerojet Trial*, 1 *Toxics L. Rep.* (BNA) 778 (Dec. 17, 1986).

149. For another Washington case on the general subject of fear of cancer, decided after *Clark*, see *Sorenson v. Raymark Industries, Inc.*, 51 Wash. App. 954, 756 P.2d 740 (1988) (asbestos case citing *Key Tronic*).

extravagant awards and limit imaginative theories. The case is *Sterling v. Velsicol Chemical Corp.*,¹⁵⁰ involving the cavalier disposal of chlorinated hydrocarbon pesticide by-product waste in a rural landfill, and the eventual contamination of many neighboring residents' wells. Five representative plaintiffs out of a certified class proceeded to trial in U.S. district court before judge alone. The court awarded over \$14 million in compensatory damages including prejudgment interest. Of that amount, \$725,000 was awarded for fear of cancer, including \$250,000 each to two plaintiffs.¹⁵¹ Four plaintiffs received a total of \$375,000 for post-traumatic stress disorder (PTSD)¹⁵² because of their emotional reactions to their exposure and their related health problems. All five plaintiffs also received a total of \$875,000 because their immune systems had been impaired. The fear of cancer, PTSD, and immunotoxicity¹⁵³ awards were in addition to compensation for some actual diseases and bodily damage.

Fear of cancer was a more sympathetic claim in *Sterling* than in many other cases because the five plaintiffs variously had some significant physical harm from drinking the water (kidney cancer, other kidney and liver damage, and central nervous system damage, as established by competent medical opinion), and the chemicals were acknowledged to be clearly carcinogenic, unlike TCE. The plaintiffs had numerous less severe complaints as well including headache, dizziness, nausea, vomiting, numbness, and nervousness. Still, however, the amount of damages was surprising, as were the findings of PTSD and immune system impairment.

On appeal, the court restored perspective by reducing the amount of damages and disallowing both the PTSD diagnosis and the immune system recovery. With respect to PTSD, the court said that:

Plaintiff's drinking or otherwise using contaminated water, even over an extended period of time, does not constitute the type of recognizable stressor identified by either professional medical organizations or courts. . . . Additionally, plaintiffs' experts presented no evidence establishing that any of the plaintiffs were, in fact, 'retraumatized' through recurrent and intrusive recollections or dreams of drinking the contaminated water.¹⁵⁴

Similarly, as concerns the immune system impairment, the appellate court found the medical community had rejected the "clinical ecology" methodology used by plaintiffs' experts to establish the immunotoxicity condition.¹⁵⁵ Immunotoxicity refers to the theory that exposure to chemicals overloads and suppresses the immune system—a type of chemical AIDS—¹⁵⁶ and thereby explains numerous unrelated bodily ailments. It is an obvious bonanza for plaintiffs stymied by generalized, apparently minor physical problems. Immunotoxicity claims such as this are frequently asserted and have met with varying degrees of success.¹⁵⁷ For instance, in another similar groundwater

150. 647 F. Supp. 303 (W.D. Tenn. 1986), *aff'd in part and rev'd in part*, 855 F.2d 1188 (6th Cir. 1988). The opinion of the district court, including adopted proposed findings, is 235 pages long.

151. See the damage award table in the appellate court opinion, 855 F.2d at 1202-1203.

152. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATICAL MANUAL OF MENTAL DISORDERS sec. 309.89, at 247 (3d ed. revised 1987).

153. See Rothman & Maskin, *supra* note 5.

154. 855 F.2d at 1210.

155. *Id.* at 1208.

156. The term "chemically induced AIDS" was held to be inflammatory and improper in *Elam v. Alcolac*, 765 S.W.2d 42, 213-14 (Mo. App. 1988) (expert witnesses had agreed the medical term was "chemically induced immune dysregulation").

157. In *Elam*, 767 S.W.2d at 82-88, 98-170, 175-197, immunologists were allowed to testify about what was generically called "chronic systemic chemical intoxicification" as well as "chemically induced immune dysregulation."

case, *Anderson v. W.R. Grace & Co.*,¹⁵⁸ the court apparently approved immunotoxicity type claims when it indicated that plaintiffs who alleged that exposure to contaminants in well water had affected their bodies ability to fight disease (a subcellular type of harm), would be allowed to take the claim to trial if manifested by objective symptomatology and substantiated by expert medical testimony.

With regard to fear of cancer, the *Sterling* court reduced the excessive damages by applying a formula of roughly \$6000 per each eight months of fear.¹⁵⁹ For example, one of the plaintiffs who had been awarded \$250,000 for fear by the trial court saw that reduced to \$18,000 based on his approximately two years of exposure. The formula came from an earlier Tennessee case, *Laxton v. Orkin Exterminating Co.*,¹⁶⁰ which had involved the contamination of plaintiffs' water supply (a nearby spring) by chlordane when the exterminator sprayed their house for termites.

At the time of *Laxton*, Tennessee had been a state that "denied plaintiffs damages where the defendant's negligence causes mental disturbance, without accompanying physical injury or physical consequences . . ."¹⁶¹ although there were limited exceptions. The court described the sum total of the Laxtons' reactions as follows:

It was this at this time [after tests] that the Laxtons learned that the contaminating chemical was chlordane and that it was a very toxic substance. It was at this time that the Laxtons became worried about their health and that of their children. Mrs. Laxton testified that she became very worried, since they had been using the water for about nine months—that everything she read about chlordane "just tore [her] to pieces." The record further shows that Mrs. Laxton would call her husband at work, and cry and express concern about the future health of her children. In fact, it would be safe to say from the evidence that the more Mrs. Laxton learned of chlordane and its properties, the more the Laxtons worried about their health and the health of their children and possible future health complications.

The mental anxiety of the Laxtons did not evidence itself in any physical way. Neither was it severe enough to require medical treatment.¹⁶²

These are probably the slightest symptoms of emotional distress seen in any case. Nevertheless, the court felt that recovery was warranted. It said that a jury could find that ingesting the polluted water was sufficient injury. A portion of the *Laxton* opinion that is frequently noted in other cases limited the time period of the allowable fear to eight months, the time between discovery of the ingestion of the chemical in the water, and the time when medical exams showed plaintiffs they had suffered no adverse effects.¹⁶³

While the district court decision in *Sterling* gives one pause to contemplate potential large awards for fear of cancer and the imaginative accompanying theories plaintiffs may use, such as PTSD and immune system dysfunction, at least the circuit court decision provides some precedent to dispose of the PTSD theory, and to reduce excessive fear awards. The vitality of *Laxton* or *Sterling* as precedent to limit the duration of the fear that can be compensated is questionable, however.¹⁶⁴ And the extent to which plaintiff allegations of immune system or subcellular bodily changes are discouraged by *Sterling* will depend on battles of the experts over the validity of immunotoxicity theory, a debate likely to continue in light of the benefits such an approach can have for plaintiffs.

158. 628 F.Supp. 1219, 1226-27 (D. Mass. 1986).

159. 855 F.2d at 1207.

160. 639 S.W.2d 431 (1982).

161. *Id.* at 433.

162. *Id.*

163. *Id.* at 434.

164. Note, *Sterling v. Velsicol Chemical Corp: Emotional Distress Damages for the Duration of Toxic Exposure*, 3 UTAH L. REV. 759, 774, 781-85 (1989) (pointing out that the Laxtons were only compensated

Another recent development is an increasing tendency to require more than animal studies to prove that a substance is a carcinogen.¹⁶⁵ California has yet to address the fear of cancer issue in a reported opinion,¹⁶⁶ but a recent trial court decision in that state adds the human carcinogen requirement while it rejects any physical injury requirement. In *Ackerson v. Dow Chemical Co.*,¹⁶⁷ the court dismissed pesticide workers' fear of cancer claims that were similar to the claims by plaintiffs in *Arnett v. Dow Chemical Co.*,¹⁶⁸ except that many of the plaintiffs in *Ackerson* who had been exposed to the pesticide DBCP had not suffered physical injuries. The court rejected the limitation of the *Arnett* test to cases involving physical injury, believing that the theory behind *Molien v. Kaiser Foundation Hospitals*¹⁶⁹ could be applied to noninjury fear of cancer cases. However, the court went on to rule that, as one of the factors needed to guarantee the genuineness of their claims under *Molien* and *Arnett*, the plaintiffs were required to show that the pesticide is a human carcinogen rather than an animal carcinogen.

The court was persuaded by expert testimony that animal tests are often unreliable predictors of human cancer, in part because doses are frequently extremely high, especially in relation to typical exposure levels for humans, and in part because of the scientific difficulties of extrapolating from animals to humans. The court held that epidemiological studies rather than studies on animals would be necessary. The court did not believe that animal carcinogenicity, even if it has led to the Government's ban-ning of the substance (as it had with DBCP), was enough of a guarantee of genuineness.¹⁷⁰

VII. CONCLUSION

The Air Force attorney who is aware of the potential for claims alleging fear of cancer is better prepared to advise base officials who are confronted with a toxic contamination case. Ordinarily, the local news media will publicize the discovery of the contamination before any claims are submitted. Obviously, that publicity, as well as Air Force information, can influence the degree and scope of citizens' fears. Here is an opportunity to minimize potential fear of cancer claims by ensuring that information that indicates the risk is low, particularly information from a non-Air Force source (and thus one less likely to be perceived as biased), is publicized or individually communicated to affected citizens.

Of perhaps even more importance than information about the risk, however, is an overall policy of full disclosure by the base. To the extent citizens perceive the Air Force as an impregnable fortress, fears are correspondingly likely to intensify. There may also

because their fear was limited, and that they were really compensated for one month of experiencing emotional distress, not for eight months exposure.

165. See, e.g., *In re Paoli Railroad Yard PCB Litigation*, 706 F.Supp. 358 (E.D. Pa. 1988) (animal studies inadmissible to prove PCBs caused diseases); Allison, *supra* note 6 (citing cases accepting, rejecting, and questioning animal data); Landau & O'Riordan, *Of Mice and Men: The Admissibility of Animal Studies to Prove Causation in Toxic Torts*, 25 IDAHO L. REV. 521 (1989).

166. One federal decision dealing with intentional torts held that a fear of cancer claim alleging immune system injury was permissible in California. *Barth v. Firestone Tire & Rubber Co.*, 661 F. Supp. 193 (N.D. Cal. 1987). See also *Potter v. Firestone Tire & Rubber Co.*, No. 81723, (Calif. Super. Ct., Monterey County, 31 Dec. 1987) (Judge awarded \$200,000 to each of the four plaintiffs in a groundwater contamination case for fear of life-threatening disease. However, the court found intentional infliction of emotional distress in addition to negligence).

167. No. 808161 (Cal. Super. Ct., San Fran. County, April 4, 1989), as reported in *Court Says Animal Data Insufficient Proof in Cancer Fear Claims Absent Physical Harm*, 3 Toxics L.Rep. (BNA) 1457 (Apr. 19, 1989).

168. No. 729586, slip.op. (Cal. Super. Ct., Mar. 21, 1983).

169. 27 Cal.3d 916, 167 Cal. Rptr. 831, 616 P.2d 813 (1980).

170. See 3 Toxics L.Rep. (BNA) 1457, at 1458 (Apr. 19, 1989).

be a long process involving expert studies and tests to identify the source and effects of the contamination or exposure. During this lengthy time residents may feel nothing is being done, or they are being stone-walled, and fear of cancer claims can be generated.

Still, regardless of attempts to provide timely information in a candid manner, some will never be convinced, particularly those who subscribe to a conspiracy theory of government. At the very least, the Air Force attorney who is aware of the potential for fear of cancer claims can help base officials avoid making the situation worse in the public relations arena. Of course, these comments are made with the recognition that it may be very difficult to influence, much less control, local publicity.

We also should not let our concerns over potential litigation unduly influence our advice to commanders when a toxic exposure case arises. In a groundwater contamination case, for example, one of the first concerns is whether the base should provide bottled water or take other action such as paying for hook-up to the public water system. Another concern is whether the affected residents should be given any warnings about possible health hazards, or be told not to drink the water.¹⁷¹

Because of a case such as *Clark*, one might worry that an action such as providing bottled water will be construed as an admission of liability in eventual tort litigation,¹⁷² which might lead to an award of damages for fear of cancer. The initial reaction might be to make them prove first that the Air Force is liable. However, the public interest and the requirements of environmental law conflict with such an approach. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹⁷³ was enacted to encourage immediate action to resolve health threats from hazardous waste disposal. Causation and liability determinations must take a back seat. Because an action such as the provision of bottled water helps effectuate CERCLA, it should be done, regardless of the effects on future tort litigation.

It may be that the provision of bottled water, hook-up to public water, or other measures, in addition to preventing further exposure, will also have the beneficial effect of alleviating residents' fears. Removal of the exposure and a demonstration that the Air Force does care, and is acting to solve the problem, would likely calm fears. On the other hand, if the exposure existed for a lengthy time before discovery, the provision of bottled water may have the opposite effect of heightening fears, for it is likely to be interpreted as confirming that there really is a problem (or else why would the Air Force provide bottled water?). Even though the exposure has ended, there may remain significant worry about exposure that has already occurred. One hopes that in most tort litigation the reasonable, good faith efforts of the Air Force to correct a contamination problem, and the salutary effect that action should have on plaintiffs' fears, will be favorably taken into account by a court evaluating any fear of cancer claim.

At the claim/investigation or the complaint/discovery stage Air Force attorneys should be alert to the possibility that the claimants may later encounter difficulty in proving causation of their physical ills, making a fear of cancer claim a better bet. A great deal can be accomplished in these early stages to rebut claims of fear of cancer, including obtaining detailed information about claimant's medical history and personal

171. However, warnings are ordinarily the province of the EPA, and thus not controllable by the Air Force.

172. *But compare* FED.R.EVID. 407 (subsequent remedial measures); FED.R.EVID. 801(a)(2) (non-verbal conduct intended as an assertion); FED.R.EVID. 804(b)(3) (statement against interest), rules which would make such an argument difficult.

173. 42 U.S.C. §§ 9601-9675 (1982 & Supp. IV 1986), as amended by Superfund Amendments and Reauthorization Act of 1986, Pub.L.No. 99-499.

problems or stressors that might be the real causes of any distress,¹⁷⁴ as well as keeping a complete record of all local publicity and information on the incident. Throughout, examine the evidence to determine the true nature of the fear symptoms and their causes, and to assess their reasonableness.

In the end, Air Force lawyers should be aware that regardless of personal feelings about the validity of fear of cancer claims,¹⁷⁵ courts do allow damages in such cases, especially where there has been a foundational physical injury or impact. And to the extent the Air Force is successful in disproving causation issues in toxic tort cases, greater emphasis on the fear of cancer claim can be expected.

174. See generally Munter & DeVries, *supra* note 148.

175. The entire public probably has a certain baseline rate of fear of cancer, in general. See Willmore, *supra* note 6, at 536. See also Gough, Environmental Exposures and Cancer Risks, 4 Toxics L. Rep. (BNA) 1249 (4 Apr. 1990) (Environmentally associated cancer risks are a small percentage, *i.e.* (2)–(6) percent of total cancer risks; smoking is a factor in 30 percent of all cancers, and diet is associated with 35 percent of all cancers).

Governmental Tort Liability Arising from the Provision of Child Care Services – Military Child Development Centers and Licensed “Family Home Day Care”

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I. INTRODUCTION

Sixty-five million Americans are children.¹ Of that number, more than eleven million are enrolled in some form of child care annually.² Increasingly, providers of child care are being confronted with claims, lawsuits, and severe financial difficulties.³ Recent actions have arisen from allegations of negligence committed by employees of child care facilities; dangerous or defective conditions found on the premises of these facilities; and, increasingly, allegations of sexual and other physical abuse.

Evidence of the ongoing problems in child care was documented in a 1982 General Accounting Office audit that determined a majority of military child care facilities were either unsafe or unsuitable for the purpose intended.⁴ In addition, a 1988 national study, conducted by the National Coalition for Children's Justice, described numerous abuse-related lawsuits aimed at organizations such as the Roman Catholic Church, the YMCA, and the United States military.⁵ Finally, the congressionally chartered National Research Council issued the report *Who Cares for America's Children* in March 1990 with recommendations for standardization of child care

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1. Bredice, *Study Finds 100-Fold Increase Reported Sex Abuse Cases*, United Press International Domestic Wire News Service, October 28, 1988.

2. *Child Abuse Task Force Urged*, USA Today, Sept. 18, 1984, at 7A, col. 1.

3. Bredice, *supra* note 1.

4. General Accounting Office Report to the Secretary of Defense, *Military Child Care Programs: Progress Made, More Needed* (June 1, 1982). The report stated that “[w]hile some military installations have up-to-date facilities specifically designed for child care, many installations have child care programs in facilities which are not suitable for this purpose and do not meet fire, health, and safety standards.” For example, the report concluded that the majority of the 318 Army child care facilities failed to meet fire and safety codes; the majority of the 73 Navy facilities required upgrading to comply with fire, safety, and sanitation standards; the Marine Corps needed additional facilities to alleviate overcrowding and increased demand; and 20% of the 162 Air Force facilities needed improvements.

5. Bredice, *supra* note 1. This article states that the Roman Catholic Church has paid out \$20 million in abuse-related lawsuits over a two-year period; the YMCA, in Tempe, Ariz., paid \$8 million in similar settlements; and the U.S. Military Academy at West Point, N.Y., faced \$110 million worth of abuse-related lawsuits. It further stated that a day care center in Tacoma, Wash., was being sued for \$40 million; in Memphis, Tenn., for \$70 million; and in Maplewood, N.J., for \$1.4 billion.

programs. The report found "a wide range of care from the awful to the wonderful, with most kids getting something somewhere in the middle."⁶

These reports, along with a series of Congressional hearings conducted during 1988 and 1989, confirm that the military is confronted with the same difficulties inherent in the provision of child care services as are found in society as a whole. During the course of the hearings, Congress emphasized the importance of child care services to members of the military, stating:

Child care has become an area of increasing concern for the military services in recent years given that more than 60 percent of today's All Volunteer Force is married with children. Moreover, the number of single parents and dual service couples has increased substantially since the military first established a child care program.

The committee believes that child care is an important readiness and retention issue for military families; readiness because single parents and dual service couples must have access to affordable and quality child care if they are to perform their jobs and be subject to long hours and deployments; retention because family dissatisfaction with military life—and particularly the inability of many spouses to establish careers or obtain suitable employment—is a primary reason trained military personnel leave the service.⁷

Furthermore, during the course of its investigation, Congress discovered myriad problems inherent in the operation of the 639 military child development centers located worldwide, as well as similar concerns presented in the licensing of family home day care providers. Specifically, testimony elicited the following:

Documented, wide-spread child sexual abuse at the Presidio child development center and reported abuse at other locations highlighted the fact that many child development centers operated under a series of ongoing safety waivers, that inspections were often carried out on an announced basis and did not necessarily provide a realistic view of center operations and staff, and that the coordination between the military services, local authorities and the Justice Department was less than adequate when abuse did occur.⁸

As an outgrowth of the hearings, Congress enacted the Military Child Care Act of 1989 on November 29, 1989. This statute addressed, *inter alia*, training of child care employees; child abuse prevention and safety at provider facilities; parental involvement in child development center operations; and funding subsidies for family home day care.⁹

While the Military Child Care Act of 1989 was enacted with the intention of improving child care services, the U.S. military will continue to confront claims and lawsuits stemming from its operation of child development centers and the licensing of family home day care providers. The purpose of this article is to identify and illustrate some of the areas of potential tort liability of the United States arising from the provision of child care services on military installations. The focus will be on liability arising from the operation of "military child development centers"¹⁰ as well as that which may arise from the military's involvement in licensing "family home

6. Hellmich, *Facing the Challenge of Caring for Our Children*, USA Today, Mar. 15, 1990, at 6D, col. 1.

7. H.R. REP. NO. 101-121, 101st Cong., 1st Sess. 307 (1989).

8. *Id.* at 308.

9. Pub. L. No. 101-189, 1501-09, 103 Stat. 1589, 1589-95 (1989) (to be codified at 10 U.S.C. § 113).

10. *Id.* at 1501(b)(1), which defines military child development center as "a facility on a military installation (or property under the jurisdiction of the commander of a military installation) at which child care services are provided for members of the Armed Forces or any other facility at which such child care services are provided that is operated by the Secretary of a military department."

day care"¹¹ providers operating on military installations. It should be noted that this article does not purport to be a comprehensive review of all court decisions dealing with these issues. Rather, a sampling of case law from various jurisdictions is presented in a framework to assist in the proper analysis of these cases.

II. PREREQUISITES FOR GOVERNMENTAL LIABILITY

Tort claims arising from the provision of child care services on a military installation will normally be evaluated under the provisions of the Federal Tort Claims Act (FTCA).¹² The enactment of the FTCA on August 2, 1946, provided a limited waiver of sovereign immunity for tort claims against the United States.¹³ The FTCA specifically authorizes a recovery against the United States when property damage, personal injury, or death is "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."¹⁴

The FTCA mandates three prerequisites for the imposition of liability on the Government. First, there must be a negligent or wrongful act or omission by a government employee.¹⁵ Second, this act or omission must have occurred while the government employee was acting in the course and scope of employment.¹⁶ Finally, there must be a legally recognized cause of action for this act or omission under the law of the state in which the incident occurred.¹⁷ While the FTCA provides a broad jurisdictional grant to impose tort liability on the United States, section 2680 of the FTCA contains thirteen specific areas that are excluded from consideration.¹⁸ Two

11. *Id.* at 1501(b)(2), which defines family home day care as "home based child care services that are provided for members of the Armed Forces by an individual who (A) is certified by the Secretary of the military department concerned as qualified to provide those services, and (B) provides those services on a regular basis for compensation."

12. See Federal Tort Claims Act, 28 U.S.C. §§ 2671-80. *But see*, 28 U.S.C. § 1346(b) that limits such actions to claims arising within the jurisdiction of the U.S. district courts located in the United States, Puerto Rico, Guam, the Panama Canal Zone, and the Virgin Islands. Accordingly, tort claims against the United States arising from the activities of the military in foreign jurisdictions will not be authorized under the FTCA. However, such claims may be authorized under the Military Claims Act, 10 U.S.C. § 2733.

13. See *Dalehite v. United States*, 346 U.S. 15 (1953); *Wood v. Standard Products Co., Inc.*, 671 F.2d 825 (4th Cir. 1982).

14. 28 U.S.C. § 1346(b).

15. Government employees include officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation. 28 U.S.C. § 2671.

16. Acting within the scope of employment in the case of a member of the military or naval forces of the United States means acting in the line of duty. 28 U.S.C. § 2671. See generally *Mider v. United States*, 322 F.2d 193 (6th Cir. 1963); *Witt v. United States*, 319 F.2d 704 (9th Cir. 1963).

17. See 28 U.S.C. § 2674; *Richards v. United States*, 369 U.S. 1, 11 (1962).

18. See 28 U.S.C. § 2680. This section excludes the following types of claims from the coverage of the Act:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-

prominent exclusions will be addressed herein: claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function,"¹⁹ and claims "arising out of [an] assault [or] battery" . . .²⁰

III. LIABILITY ARISING FROM OPERATION OF MILITARY CHILD DEVELOPMENT CENTERS

A. Standard of Care

The initial question in every tort claim filed against the United States, for activities at military child development centers, is what duty and standard of care, if any, is owed to the injured child. Some jurisdictions hold child development centers to a reasonable care standard.²¹ Others hold centers to the "highest degree of care"²² or to an "onerous duty" to protect the children.²³ Regardless of how the standard is defined, the age of the child and other attendant circumstances will frequently be taken into consideration in determining whether there was a breach of a duty owed to the injured child.²⁴ Determining the applicable standard of care is crucial, because certain conduct may not breach a specific duty when a reasonable care standard is applied, while the same conduct may constitute an actionable breach when a higher degree of care is applicable.

Additionally, it must be cautioned that the duty owed by the operator of a child development center or day care nursery whose basic service is supervision of infants and very young children, is substantially different in degree from that owed by a school whose primary function is education and where supervision is incidental.²⁵

enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

...

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this provision, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

19. *Id.* at § 2680(a).

20. *Id.* at § 2680(h).

21. See *Larry v. Commercial Union Ins. Co.*, 88 Wis.2d 728, 277 N.W.2d 821 (1979); *Martin v. Children's Sesame, Inc.*, 188 Ga.App. 242, 372 S.E.2d 648 (1988).

22. See *Drueding v. St. Paul Fire & Marine Ins.*, 482 So.2d 83, 86 (La. App. 1986).

23. See *Brown v. Knight*, 362 Mass. 350, 285 N.E.2d 790 (1972).

24. See *Larry*, 88 Wis.2d 728, 277 N.W.2d 821; *Drueding*, 482 So.2d 83; *Fowler v. Seaton*, 39 Cal. Rptr. 881, 394 P.2d 697 (1964); *Jones v. Jones*, 199 Ga. App. 788, 168 S.E.2d 881 (1969).

25. See *Fowler*, 39 Cal. Rptr. at 885, 394 P.2d at 701.

Therefore, standards of care employed against public or private grammar and high schools will not necessarily be controlling on military child development centers. Specifically, when it comes to supervision, more may be expected from child development centers.

B. Theories of Liability

After determining the applicable standard of care, the next step in evaluating potential tort liability of military child development centers is to examine the law of the jurisdiction where the claim arose to identify specific duties and legal theories for imposing liability. Child development centers have been found liable under a variety of tort theories. While there are some variations in the law from state to state, these general theories of law will be divided into several broad categories for discussion. These are *respondeat superior*; intentional torts; negligent hiring and retention of employees; negligent supervision; violation of regulations designed to protect children; training and qualifications of employees; dangerous instrumentalities and defects on the premises; and *res ipsa loquitur*.

C. Respondeat Superior

Respondeat superior essentially provides that employers can be held liable for the negligent, willful, malicious, or criminal acts of their employees when such acts are committed in the course and scope of their employment.²⁶ However, when these acts are committed for a purpose that is personal to the actor and independent of the employer's purpose, the employer should not be held liable under the doctrine of *respondeat superior*.²⁷ These general principles of law are applicable to all types of employers, including child development centers.²⁸ While *respondeat superior* is frequently an underlying basis in state court decisions to hold child development centers liable for the negligent actions of their employees, the doctrine itself is rarely addressed as an issue in the reported decisions.²⁹ Nevertheless, the doctrine may be applicable to hold the United States liable for negligent acts committed by its employees at military child development centers.

D. Intentional Torts

It must be stressed, however, that the doctrine of *respondeat superior* cannot be applied to hold the United States liable for intentional torts such as physical or sexual abuse committed by the employees of military child development centers. While the United States has legislatively waived much of its sovereign immunity with the enactment of the FTCA, it has expressly reserved its immunity in specific areas. Section 2680(h) of the FTCA specifically precludes holding the United States liable for any "claim arising out of assault [and] battery. . . ."³⁰

26. See *Randi F. v. High Ridge YMCA*, 170 Ill. App. 3d 962, 964, 524 N.E.2d 966, 968 (1988); 57 C.J.S. *Master and Servant* 571-73 (1948).

27. See *Randi*, 170 Ill. App. 3d at 964, 524 N.E.2d at 698; 57 C.J.S. *Master and Servant* 574 (1948).

28. 57 C.J.S. *Master and Servant* 563 (1948).

29. *Respondeat superior* has more frequently been addressed in child development center cases where the employee's conduct was more severe than negligence. See, e.g., *Randi*, 170 Ill. App. 3d 962, 524 N.E.2d 966 (beating and sexual abuse); *Moseley v. Second New St. Paul Baptist Church*, 534 A.2d 346 (D.C. App. 1987) (sexual assault); *A Child's World, Inc. v. Lane*, 171 Ga. App. 438, 319 S.E.2d 898 (1984) (spanking).

30. 28 U.S.C. § 2680(h).

While *respondeat superior* is not a viable theory to hold the United States liable for intentional torts, alternative theories of recovery based on negligence that is independent of the intentional tort may exist. One such theory applicable to military child development centers is an allegation of negligence in the supervision and safeguarding of children who are attending the center. It must be stressed that, prior to the United States Supreme Court's landmark decision of *Sheridan v. United States*³¹ discussed below, the circuit courts of appeal were divided on the issue of whether the United States could be held liable for actions sounding in negligence, but involving an intentional tort committed by a government employee. Some circuits followed the rule that, if a government employee committed an assault or battery, section 2680(h) unconditionally barred actions under the FTCA even though some negligence on the part of the Government was alleged.³² Other circuits took a different approach, holding section 2680(h) did not bar causes of action based on the Government's negligence for failing to prevent an intentional tort.³³

*John and Alexis Doe v. United States*³⁴ is the only federal circuit court decision that specifically addressed whether a military child development center could be held liable under the FTCA for claims involving intentional torts committed against the attending children. The United States Supreme Court, in *Sheridan*, expressed approval of the approach taken by the *Doe* court.³⁵ *John and Alexis Doe* involved allegations that two minor children were sexually molested by unknown parties while in the care of the Scott Air Force Base Day Care Center.³⁶ The court found the child development center had affirmatively assumed a duty to care for and safeguard the children while they were enrolled. The court stated this duty was assumed prior to, and was independent of, the alleged assaults. Plaintiffs' claims were viewed as arising from the Government allegedly leaving the children in a position where the subsequent assaults were possible and not arising out of the alleged assaults themselves. The court reasoned that the fact that the children were allegedly assaulted only served to show the damage from the negligent supervision. Finally, the court found no rationale for distinguishing an action solely on the status of the assailant as a federal employee.³⁷

There are two federal district court decisions involving the liability of military child development centers for intentional torts committed while children were at the center. In *Doe v. Scott*,³⁸ the West Point Child Development Center in New York was found liable for sexual abuse occurring at the center based upon a breach of its duty to safeguard the children. In *Mary Doe v. United States*,³⁹ the child development center

31. 487 U.S. 352 (1988).

32. See *Miele by Miele v. United States*, 800 F.2d 50 (2d Cir. 1986)(negligent supervision of mentally ill soldier who assaulted infant); *Thigpen v. United States*, 800 F.2d 393 (4th Cir. 1986)(minors sexually assaulted by Navy hospital employee while they were patients at a Naval hospital); *Garcia v. United States*, 776 F.2d 116 (5th Cir. 1985)(negligent supervision of military recruiter who engaged in sexual acts with potential recruit); *Satterfield v. United States*, 788 F.2d 395 (6th Cir. 1986)(negligence in allowing enlistment and negligence in supervision of off-duty serviceman who killed another serviceman); *Hoot v. United States*, 790 F.2d 836 (10th Cir. 1986)(negligently denying request for treatment of mentally unbalanced serviceman who subsequently assaulted woman).

33. *John and Alexis Doe v. United States*, 838 F.2d 220 (7th Cir. 1988)(allegations that staff at a military child care center negligently supervised children, resulting in alleged sexual assaults upon the children); *Kearney v. United States*, 815 F.2d 535 (9th Cir. 1987)(negligent placement of prisoner in "loose" custody whereby he had the opportunity to murder a woman).

34. 838 F.2d 220 (7th Cir. 1988).

35. *Sheridan*, 487 U.S. 352, 402, n. 7.

36. *John and Alexis Doe*, 838 F.2d at 221.

37. *Id.* at 222-24.

38. 652 F. Supp. 549 (S.D.N.Y. 1987).

39. Civil Action No. S87-0134GN (U.S.D.C. S.D. Miss. May 1, 1989) (unpublished opinion).

at Keesler Air Force Base, Mississippi, was held not liable for sexual abuse of a three-year-old girl who was diagnosed with vaginitis after a visit to the center. The plaintiff specifically based her claim on negligent supervision by employees at the center in permitting an assault to occur. In an apparent attempt to avoid the section 2680(h) exclusion for claims "arising out of an assault . . .," plaintiff alleged the assault was carried out by an unknown assailant who was *not* a center employee. The trial judge found no evidence of sexual abuse or other trauma to the infant, and, therefore, found the United States did not breach any duty owed to the child.⁴⁰

Shortly after the Seventh Circuit's decision in *John and Alexis Doe*, the decision of *Sheridan* was announced by the United States Supreme Court on June 24, 1988. *Sheridan* tried to resolve the existing conflicts among the various circuits and, in so doing, fundamentally altered the way in which the exception for claims "arising out of an assault [and] battery . . ." under the FTCA was to be interpreted.⁴¹ *Sheridan* made it clear that the assault and battery exception does not apply to assaults or batteries committed by persons who were not federal employees.⁴² More importantly, *Sheridan* held section 2680(h) does not bar a claim involving a foreseeable assault or battery committed by a federal employee where the claim is based upon the negligent acts of federal employees, other than the assailant, that are entirely independent of the assailant's employment status.⁴³

Under *Sheridan*, there must be negligence meeting at least four requirements. First, the negligence must involve a breach of some duty owed to the victim. Second, the duty upon which the negligence is based must exist prior to the assault or battery. Third, the negligence relied upon must be recognized as a legal cause of action under the law of the state in which the claim arose. Fourth, the negligence must be "entirely independent" of the employment status between the assailant and the Government.

A source of future controversy may arise under the fourth requirement, since the majority opinion failed to define what it meant by "entirely independent" of the intentional tortfeasor's employment status. In a footnote, the majority stated "it is not appropriate in this case to consider whether negligent hiring, negligent supervision, or negligent training may ever provide the basis for liability under the FTCA for a foreseeable assault or battery by a Government employee."⁴⁴ Therefore, these types of negligence might be construed as not being "entirely independent" of the employment status of the assailant. Justice Kennedy's concurring opinion in *Sheridan* supports this proposition, stating that:

If the allegation is that the Government was negligent in supervision or selection of the employee and that the intentional tort occurred as a result, the intentional tort exception of section 2680(h) bars the claim. Otherwise, litigants could avoid the substance of the exception because it is likely that many, if not all, intentional torts of Government employees plausibly could be ascribed to the negligence of the tortfeasor's supervisor. To allow such claims would frustrate the purposes of the exception.⁴⁵

In the aftermath of *Sheridan*, two circuit courts have addressed intentional tort issues. In *Bembenista v. United States*,⁴⁶ the court, following *Sheridan*, held the assault

40. *Id.*

41. *Sheridan*, 487 U.S. 392, 398.

42. *Id.* at 400.

43. *Id.*

44. *Id.* at 403, n.8.

45. *Id.* at 407-08.

46. 866 F.2d 493 (D.C. Cir. 1989).

and battery exception did not bar suit by a patient sexually assaulted by a medical technician under treatment at an Army medical center. The court ruled that the Government owed a special duty, under the laws of the District of Columbia, to protect patients from foreseeable injurious acts of third persons.⁴⁷ A different result occurred in *Guccione v. United States*.⁴⁸ There, the court found that a claim alleging the United States was negligent in failing to supervise an undercover FBI operative in an investigation was barred by the intentional tort exception. The court determined that *Sheridan* did not aid *Guccione* because any negligent supervision on the part of those overseeing the investigation was not "entirely independent" of the employment relationship between the Government and the FBI operative committing the assault.⁴⁹

Based on the foregoing, analysis of a claim filed against the United States involving physical or sexual abuse committed by employees of military child development centers must include an analysis of *Sheridan* and its progeny. Specifically, the practitioner must determine whether the law of the state where the claim arose will impose a duty on child development centers to protect children under their care from assaults and batteries. There are a limited number of reported state court decisions analyzing the application of such a duty to child development centers. Lacking a decision directly on point, proper analysis will require examination of the state's general tort law principles and analogy to a child development center. Such analysis, at a minimum, will require a determination of whether the jurisdiction has a general rule imposing a duty to protect others from criminal assaults; whether the jurisdiction recognizes special relationships that might increase or create this duty to protect others from criminal assaults, including relationships such as carrier-passenger, innkeeper-guest, business invitor-invitee, or voluntary custodian-protectee; and whether the jurisdiction requires the criminal assault to have been reasonably foreseeable as well as how the state will determine whether an assault was foreseeable.⁵⁰

If a jurisdiction imposes a duty on child development centers to protect children from assaults, the next question under *Sheridan* is whether this duty is "entirely independent" of the employment status between the Government and the employee

47. *Id.* at 497-98.

48. 878 F.2d 32 (2d Cir. 1988).

49. *Id.* at 33.

50. See, e.g., *Figueroa v. Evangelical Covenant Church*, 879 F.2d 1427 (7th Cir. 1989). Furthermore, when determining whether a duty exists under state law, consider whether the state recognizes the "Good Samaritan" doctrine or an analogous cause of action based upon negligence in the course of attempting to render services. With respect to the latter, consider Restatement (Second) of Torts 323 (1966) which provides:

One who undertakes, gratuitously or for consideration to render services to another which he should recognize as necessary for the protection of the other's person or thing, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

When determining foreseeability of a criminal assault, consider whether the state applies principles similar to those set forth in Restatement (Second) of Torts 448 (1966), which provides:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

committing the assault. Until this issue is clarified by the Supreme Court or the circuit court for the jurisdiction, theories such as the negligence of military child development centers in hiring or supervising its employees are, arguably, barred by the intentional tort exception to the FTCA.

Furthermore, it must be cautioned that, while claims based upon negligence in supervising child development center employees may be barred, such negligence in supervising employees is separate and distinct from allegations of negligence in supervising and safeguarding the children. Failing adequately to supervise children within the center is an action independent of the employment relationship and is authorized under *Sheridan*. Finally, because the law is uncertain and future claims alleging negligent hiring or retention of unfit employees by military child development centers may be presented against the United States, this particular theory will be discussed in greater detail in the following section.

E. Negligent Hiring and Retention of Employees

With respect to allegations of negligence in the hiring and retention of child development center employees, the crux of plaintiffs' arguments has been that the child development center employed an individual unfit to care for the children. *Bennett v. United States*⁵¹ is an analogous federal case that held that a teacher at a Bureau of Indian Affairs boarding school was an unfit employee. In *Bennett*, the teacher admitted on his employment application that he had been arrested and charged with violating Oklahoma's "Outrage to Public Decency" statutes and that a valid bench warrant was outstanding on that charge. The Bureau of Indian Affairs never conducted a background investigation prior to hiring the teacher and assigning him to the boarding school. While employed at the school, the teacher sexually abused several of his students.⁵² The court ruled that the assault and battery exception to the FTCA did not insulate the Federal Government from liability for the teacher's sexual assaults on the students, because the Government was negligent in hiring and continuing to employ the teacher despite indications of a predilection toward sexual abuse.⁵³ It must be emphasized, however, that *Bennett* preceded *Sheridan* and appears to be inconsistent with *Sheridan*'s requirement that the negligence alleged must be entirely independent of the employment status.

As noted above, negligent hiring claims are arguably barred by the assault and battery exception under *Sheridan*.⁵⁴ However, in the event *Sheridan* is subsequently interpreted to authorize FTCA claims based on negligent hiring or retention of employees, it is significant that most jurisdictions permit this cause of action against employers.⁵⁵

This normally will arise in a situation where a child development center has employed an individual who subsequently assaults a child. The question for the court may become whether the center had any prior notice of a predilection on the part of the employee toward such conduct. Given notice on the part of the center, was the employee placed in a position where opportunity for further assaults was available? This situation may be aggravated by regulatory provisions requiring more than one person to be in a center with children at all times.

51. 803 F.2d 1502 (9th Cir. 1986).

52. *Id.* at 1503.

53. *Id.* at 1504.

54. See the preceding intentional torts section. The authors further note that the court in *Bembenista*, 866 F.2d at 498, refused to decide whether a negligent hiring claim was permitted under *Sheridan* and allowed a recovery on other grounds.

55. 57 C.J.S. *Master and Servant* 559 (1948).

When negligence in hiring or retention is alleged against child development centers, the key issue often becomes what constitutes a breach of this duty. One decision that addressed this issue is *Moseley v. Second New St. Paul Baptist Church*.⁵⁶ *Moseley* involved a part-time janitor for a church sponsored day care center who sexually abused two children. The court held that, in the absence of a showing that the church knew or should have known of any prior history or tendency towards assaults by the person whom it hired as janitor, the church could not be held liable to the sexually assaulted children on the theory of negligent hiring of the janitor.⁵⁷ The *Moseley* standard of whether the employer knew or should have known of the employee's unfitness is the generally accepted rule.⁵⁸

F. Negligent Supervision

Negligent supervision is one of the theories most frequently employed to hold child development centers liable for injuries sustained by children attending the centers. Parents entrust such centers with the safety of their infants and young children. This entrustment creates a duty on the centers adequately to supervise the children because the average child is ill-equipped to care for himself. In fact, the majority of jurisdictions severely restrict finding such infants and young children capable of contributory negligence.⁵⁹

Negligent supervision was discussed by the court in *Drueding v. St. Paul Fire & Marine Ins.*⁶⁰ The court held that liability will be imposed against a nursery school only where there is a causal connection between the lack of supervision and the accident that could have been avoided by the exercise of the required degree of supervision. In *Drueding*, a five-year-old boy suffered a broken leg while playing on the nursery school grounds. The injury was sustained in a collision with another boy while jumping to catch a Frisbee thrown by a different playmate. Evidence was presented that the Frisbee game was being played in a confined area occupied by fifteen children. There were two supervisors on duty at the nursery, but there was no adult present in the yard at the time of the accident. The court found that the evidence supported the jury's finding of negligence in permitting the plaintiff and his companions to engage in Frisbee throwing in a confined area where it was foreseeable that children of his young age could injure themselves in collisions with each other while jumping for the flying toy. The court reasoned that proper supervision would have stopped the free-for-all Frisbee game.⁶¹

Negligent supervision by child care providers has been found to exist under a wide variety of circumstances. In *Yates v. Children's Workshop*,⁶² a day care center was held liable under this theory for failing to prevent a child from falling from steps leading to a slide. In *Crohn v. Congregation B'Nai Zion*,⁶³ a church-run day camp was held liable for injuries a child sustained when he was struck in the face by a baseball bat swung by another child attending the camp. Finally, in *Larry v. Commercial Union Ins. Co.*,⁶⁴ a supervisor failed to notice a two-year-old child leave

56. 534 A.2d 346.

57. *Id.* at 349, n.6.

58. 57 C.J.S. *Master and Servant* 559 (1948).

59. 65A C.J.S. *Negligence* 145 (1966).

60. 482 So.2d 83, 86 (La. App. 1986).

61. *Id.* at 83-86.

62. 555 So.2d 503 (La. App. 1989).

63. 22 Ill. App.3d 625, 317 N.E.2d 637 (1974).

64. 88 Wis. 2d 728, 277 N.W.2d 821 (1979).

the classroom. The child went to the restroom where she injured her chin on a commode when another child tried to assist her by lifting her up. The court imposed liability based on the negligence of the supervisor.

However, courts have also held that child care providers are not liable for every fall or accident involving a young child under their care.⁶⁵ For example, in *Tobin v. Hewlett Branch Athletes, Inc.*,⁶⁶ the court held that where the activity causing the child's injury was so innocuous that it could not reasonably have been foreseen, liability would not attach. *Tobin* involved a young boy at a day camp playing a game of "dodge ball" in which the players attempted to avoid contact with a ball tossed at them. After jumping in the air to avoid a ball, Tobin came down with his feet in contact with the ball. As a result, he fell and sustained injuries. The court declined to impose liability on the day camp for permitting the children to engage in this game.⁶⁷

G. Violation of Regulations Intended to Protect Children

Another theory upon which liability of military child development centers may be imposed arises from the violation of various regulations or standards enacted for the protection of the children. This issue was addressed in *Doe v. Scott*,⁶⁸ a case involving sexual abuse committed against children attending the West Point Child Development Center. The claimants alleged the Government violated its own regulations and was otherwise negligent in discharging its duty to protect and safeguard the children. The violations of regulations alleged included taking the children from the center without parental approval; failing to require that all areas in which children could be taken were open to view; and failing to ensure that all doors in the child play area were nonlocking.⁶⁹ Several state court decisions have also involved violations of regulatory controls or standards. These include the failure of child care centers to comply with regulations governing staff/child ratios;⁷⁰ and a failure to comply with health department regulations requiring playgrounds located on child care centers to be maintained in a usable, safe, and sanitary condition, free from obvious hazards.⁷¹

Based on the foregoing, proper analysis of any military child development center case must include a thorough review of any applicable regulations governing child care. For example, Air Force Regulation (AFR) 215-27 has specific requirements in this area.⁷² The regulation sets "minimum criteria for financial support and standard operating procedures"⁷³ with the stated objective of providing a "safe, well-staffed, equipped, and managed child development program . . . to meet the physical, social, emotional, and intellectual needs of children and give them the protection and security they need during the part of the day when they are away from their parents."⁷⁴

Given its stated purpose and intended beneficiaries, the regulation contains a large number of provisions that could be construed as creating duties, the breach of which

65. See, e.g., *Klein v. Hoffman*, 15 A.D.2d 899, 225 N.Y.S.2d 628 (1962)(fall from swing); *Tobin v. Hewlett Branch Athletes, Inc.*, 2 A.D.2d 758, 153 N.Y.S.2d 414 (1956)(fall on tossed ball); *Lopez v. Union Settlement Association*, 25 A.D.2d 520, 267 N.Y.S.2d 219 (1966)(fall from monkey bars).

66. 2 A.D.2d 758, 153 N.Y.S.2d 414 (1956).

67. *Id.*

68. 652 F. Supp. 549 (S.D.N.Y. 1987).

69. 652 F. Supp. at 550.

70. See *Oldham v. Hoover*, 140 So.2d 417 (La. App. 1962); *Larry*, 88 Wis.2d 728, 277 N.W.2d 821 (1979).

71. See *LaTorre v. First Baptist Church of Ojus*, 498 So.2d 455 (Fla. App. 1986).

72. See Air Force Reg. (AFR) 215-27, para. 2, *Child Development Program* (Mar. 14, 1986).

73. *Id.* at preamble.

74. *Id.* at para. 2.

could provide a basis for a cause of action. Further, the regulatory provisions may provide persuasive evidence of the appropriate standard of care to be applied in a given case. These provisions include mandatory safety inspections;⁷⁵ adequate usable floor space per child;⁷⁶ an isolation area to separate children suspected of having communicable diseases;⁷⁷ carpeting in the majority of the premises;⁷⁸ adequate lighting for play and other activities;⁷⁹ protective coverings for radiators, fireplaces, electric fans, and steam and hot water pipes;⁸⁰ hot water in plumbing fixtures not exceeding 110 degrees F;⁸¹ doors not having sharp or pointed handles;⁸² counterbalanced double hung windows to prevent finger injuries;⁸³ stairways with antislip treads, hand rails for children, and one-way gates at the top;⁸⁴ five-foot high fences around outside play areas and playground equipment that must be kept in good repair and of the size and type recommended by manufacturers for the age of the children using it;⁸⁵ staff-to-child ratios coupled with a requirement that the children may never be left unattended and that two staff members must always be present whenever children are on the premises;⁸⁶ a staff training program;⁸⁷ premises kept in sanitary condition;⁸⁸ and materials hazardous to children kept in areas inaccessible to children.⁸⁹

The violation of military regulations, such as AFR 215-27, can have an impact on determining the tort liability of the United States. Courts have held that, normally, the violation of a federal statute or regulation by governing officials does not, of itself, create a cause of action under the FTCA.⁹⁰ However, if state law imposes a duty, a federal statute or regulation may then provide the standard of reasonable care in exercising the state law duty.⁹⁰ In other words, if there is a state law duty analogous to the duty imposed by federal statute or regulation, the statute or regulation may be relevant to the analysis of the state cause of action under the FTCA.⁹²

The United States Supreme Court, in *Sheridan v. United States*, addressed this issue.⁹³ The case arose when a naval medical aide named Carr finished his shift at the Bethesda Naval Hospital and consumed a large quantity of various alcoholic beverages.⁹⁴ Carr then packed some belongings, a rifle and some ammunition into a uniform bag. Later that evening, three naval corpsmen found Carr in a drunken stupor lying face down on the floor of a hospital building.⁹⁵ The corpsmen attempted

75. *Id.* at para. 4(h).

76. *Id.* at para. 8(a).

77. *Id.* at para. 8(c)(3).

78. *Id.* at para. 8(e).

79. *Id.* at para. 9.

80. *Id.* at para. 9(b).

81. *Id.* at para. 9(f).

82. *Id.* at para. 12(a).

83. *Id.* at para. 12(b).

84. *Id.* at para. 12(c).

85. *Id.* at para. 15(b)(c).

86. *Id.* at para. 26.

87. *Id.* at para. 27.

88. *Id.* at para. 57.

89. *Id.* at para. 58.

90. *Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151 (D.C. Cir. 1985). See also *Schindler v. United States*, 661 F.2d 552 (6th Cir. 1981) (the federal regulatory statute is usually not the source of a private right of action).

91. See 2 L. JAYSON, *Personal Injury: Handling Federal Tort Claims* 218.01 (1989).

92. *Art Metal-U.S.A., Inc.*, 753 F.2d at 1158 (regulations may provide evidence that the Government has assumed duties analogous to those recognized by local law); *Schindler*, 644 F.2d at 560 (regulation may be relevant in the analysis of the state cause of action in defining the scope of the undertaking of the United States and the plaintiff's right to rely thereon).

93. *Sheridan*, 487 U.S. 392 (1988).

94. *Id.* at 395.

95. *Id.*

to take Carr to the Emergency Room where he struggled and broke away. During the struggle, the corpsmen observed the rifle barrel in the uniform bag. Startled, the corpsmen fled without attempting to subdue Carr or notifying the appropriate authorities.⁹⁶ Some time later, Carr fired several shots into an automobile being driven by the Sheridans near the Bethesda Naval Hospital, causing physical injury to Mrs. Sheridan and damage to the automobile.⁹⁷ While discussing the effect of existing regulations promulgated by the Navy, the court stated:

By voluntarily adopting regulations that prohibit the possession of firearms on the naval base and that require all personnel to report the presence of any such firearm, and by further voluntarily undertaking to provide care to a person who was visibly drunk and visibly armed, the Government assumed responsibility to "perform [its] 'good Samaritan' task in a careful manner."⁹⁸

Similar reasoning could be applied to military child development centers. Air Force regulations are arguably designed to provide a safe and secure environment for child care by mandating adherence to specific regulatory guidelines. By adopting regulations governing the operation of child development centers and by voluntarily operating these centers on its installations, the "Government has assumed responsibility to perform [any state imposed duties regarding the provision of child care, e.g., - adequate supervision, staff/child ratio, and safe premises] in a careful manner."⁹⁹

H. Training and Qualifications

The adequacy of the training and qualifications of child care center employees is another area that has generated litigation against such facilities. Frequently, these cases attack the medical expertise or qualifications of the center employees. The variety of issues that can arise was addressed in *Applebaum v. Nemon*.¹⁰⁰ Initially, the court examined the issue of whether the child care center had a duty to render aid to a child where the center would not have been liable for the initial injury. The court, in *Applebaum*, held that the relationship between a child and the child care center includes both an implied agreement and a duty to render reasonable assistance to a child who, while in the custody of the center, becomes imperiled.¹⁰¹ Next, the court reviewed the parameters of reasonable assistance to the child. *Applebaum* held that child care centers were not required to do more than administer whatever initial aid they could reasonably provide and were knowledgeable enough to provide.¹⁰² The court stated that reasonable steps should also be taken to place the injured child in the hands of a competent physician.¹⁰³ Such centers are not required to provide life-saving measures that involve special training, such as cardiopulmonary resuscitation. Further, they are not expected to instruct employees in procedures for handling medical emergencies or to conduct drills.¹⁰⁴ Finally, the court in *Applebaum* addressed the issue of liability where a child care center employee who, lacking adequate medical training, undertakes to render medical assistance. The court ruled

96. *Id.*

97. *Id.*

98. *Id.* at 401.

99. *Id.*

100. 678 S.W.2d 533 (Tex. Civ. App. 1984).

101. *Id.* at 535.

102. *Id.* at 536.

103. *Id.*

104. *Id.* at 537.

that the child care center could be held liable if such assistance was found to be detrimental.¹⁰⁵

Further issues may arise concerning required qualifications of employees working at day care centers, as well as the lack of qualifications. For instance, these issues may arise where the child care center employs staff members who are under the age of majority. In *Crohn v. Congregation B'Nai Zion*, the court held it was a question of fact as to whether it was reasonable for a church-run summer day camp to employ a fifteen-year-old counselor to supervise younger children.¹⁰⁶ Another area in which qualifications may become an issue is the general knowledge, skills, and experience level of the individual employee. In *Garber v. Central School District*,¹⁰⁷ a child was injured at a school while participating in a game under the supervision of a janitor employed by the school. The court held the janitor did not possess the knowledge, skill, or experience necessary to supervise children.¹⁰⁸

Government statutes and regulations may impose similar or even more stringent requirements concerning the qualifications of military child development center employees. For example, in the area of medical training and qualifications, the Military Child Care Act of 1989 specifically mandates that military child development center employees receive, at a minimum, training in cardiopulmonary resuscitation and other emergency medical procedures.¹⁰⁹ Regulations also establish more general qualifications such as age, ability to speak English, and ability to care for and work with children.¹¹⁰ When the qualifications mandated by the Federal Government are greater than the applicable standard of care imposed by the common law of the jurisdiction in which the incident occurs, the Government regulations may define the standard of care assumed by the United States or the scope of its undertaking.¹¹¹

I. Dangerous Instrumentalities and Defective Premises

Dangerous instrumentalities and defects on the premises of the military child development center will provide additional bases to hold the Government liable for injuries sustained by children attending the center. While the circumstances from which these types of claims can arise are too diverse to cover in this article, a number of state court decisions will be examined to identify several types of dangerous instrumentalities and defects commonly associated with child development centers.

Playground equipment is often alleged to be a dangerous instrumentality in the reported cases. For example, in *Oldham v. Hoover*,¹¹² a child injured his nose while playing on a piece of mobile playground equipment known as a "rockaway." The court held the rockaway was not a dangerous instrumentality where the record showed all the playground equipment present in the nursery had been inspected and approved by the State Department of Public Welfare; the rockaway was designed solely for the use of children in the plaintiff's age group; it contained no jagged or pointed ends upon which a child might injure himself; all corners were gently curved; and children frequently used the rockaway at the center, without incident or accident.¹¹³ Injuries to children

105. *Id.*

106. 22 Ill. App. 3d 625, 317 N.E.2d 637 (1974).

107. 295 N.Y.S. 850 (1937).

108. *Id.*

109. Pub. L. No. 101-189 at 1503(a).

110. See Department of Defense (DOD) Instruction 6060.2, *Child Development Programs*, encl. 3 (March 3, 1989); AFR 215-27 at para. 27.

111. See *supra* notes 90 and 91. See also *Moody v. United States*, 774 F.2d 159 (6th Cir. 1985).

112. 140 So.2d 417.

113. *Id.* at 421-22.

have resulted from a variety of playground equipment.¹¹⁴

Even when playground equipment is not inherently dangerous, a question often arises regarding the safety of the grounds in close proximity to such equipment. For example, in *Robbins v. Camp Sussex, Inc.*,¹¹⁵ a children's camp was held liable for injuries to a child sustained in a fall from playground equipment where the evidence established the camp was negligent in permitting the existence of rocks under the equipment. The court, in *Jamieson v. Dale*,¹¹⁶ similarly indicated that having a hard, nonresilient substance under a seesaw at a child care center may constitute negligence. By contrast, a nursery was exonerated in *Tuggle v. Bass*.¹¹⁷ In *Tuggle*, a child was allegedly struck by a swing in a nursery school yard. The court held the nursery school operator did not have a duty to erect fences or other safeguards around the swing set.¹¹⁸

Child development centers have also been held liable for dangerous instrumentalities located within the facilities. These cases frequently involve items that create a special risk to infants and young children due to their inability fully to comprehend the danger involved. A prime example of this is *Gurley v. St. Paul Fire & Marine Underwriters, Inc.*¹¹⁹ In *Gurley*, a church nursery was held liable for placing an electric fan in a room with small children. A two-and-a-half-year-old child sustained injuries from the fan when he stuck his fingers through the grate and into the moving fan blades. In *Comeaux v. Commercial Union Ins. Co.*,¹²⁰ a private day camp was similarly held liable for allowing a child to play in a room containing unstable desks that constituted a hazard. Finally, in *Lewis v. Kehoe Academy*,¹²¹ the court held the operator of a day camp had a duty to exercise reasonable care in preventing a child from ingesting rat poison.

Another line of cases involves child development centers exposing children to unreasonable risk of burns from dangerously hot items. For instance, in *Jones v. Jones*,¹²² a nursery was held liable for the burns of a two-year-old child when she pulled over a large container filled with hot soup. The court determined the defendant's agent was negligent in placing hot soup in close proximity to a two-year-old, because this created a situation of which the results and consequences were neither remote nor unforeseeable but apparent.¹²³ Liability was similarly found to exist in *Bonnet, Etc. v. Slaughter*.¹²⁴ In *Bonnet*, a nursery owner turned on hot water in a bath tub while a child waited outside the tub. When the nursery owner moved to reach for clothes, soap, and a towel, the child put his hand under the hot running water and was burned.¹²⁵ And in *Brown v. Knight*,¹²⁶ a proprietress of a summer school was held liable for burns a four-year-old child sustained when horseplay led to him being pushed into a fireplace in a picnic area.

Finally, child development centers, like other premises owners, can be held liable for structural defects existing on their facilities. Certain hazards are more likely to

114. *Yates*, 555 So.2d 503 (1989)(slide); *Klein*, 15 A.D.2d 899, 225 N.Y.S.2d 628 (1962)(swing); *Lopez*, 25 A.D.2d 520, 267 N.Y.S.2d 219 (1966)(monkey bars).

115. 28 Misc.2d 16, 216 N.Y.S.2d 176 (1960).

116. 670 S.W.2d 195 (Mo. App. 1984).

117. 240 So.2d 790 (La. App. 1970).

118. *Id.*

119. 242 So.2d 298 (La. App. 1971).

120. 269 So.2d 500 (La. App. 1972).

121. 346 So.2d 289 (La. App. 1977).

122. 119 Ga. App. 788, 168 S.E.2d 883 (1969).

123. *Id.*

124. 422 So.2d 499 (La. App. 1982).

125. *Id.*

126. 362 Mass. 350, 285 N.E.2d 790 (1972).

prey upon young children. An example of this was illustrated in *Gerber Children's Centers, Inc. v. Harris*.¹²⁷ In *Gerber*, a two-year-old child recovered damages for severe cuts and lacerations he sustained as a result of his fall through a plate glass window located in the romper room of the day care center. The child fell through the window while playing on his walking horse. The window did not have safety glass and had a bottom ledge about one foot above the floor. The center employees were aware the window was not made of safety glass and tried to rely on natural barriers near the window, such as tables and rockers, as a method to prevent an accident.¹²⁸

While a window without safety glass and a short ledge was considered a dangerous structural condition in *Gerber*, other structural conditions on the premises may not be deemed dangerous despite the fact that they cause injury to children. For instance, two courts have held child development centers will not be liable for injuries children received from doors slamming on their fingers.¹²⁹

J. *Res Ipsa Loquitur*

A final theory that may be applied to hold child development centers liable is the doctrine of *res ipsa loquitur*. This doctrine is recognized in almost every jurisdiction.¹³⁰ It has been defined as a rebuttable presumption or inference that the defendant was negligent, which arises upon proof that the instrumentality causing the injury was in the defendant's exclusive control, and that the accident was one which ordinarily does not happen in the absence of negligence.¹³¹

The courts that have applied *res ipsa loquitur* against child development centers appear to be stretching the doctrine's technical requirements to provide a basis for liability arising from unexplainable injuries — short of imposing strict liability. For example, the court in *Fowler v. Seaton*,¹³² held *res ipsa loquitur* may apply to a private nursery where the cause of injury is a mystery. The case involved a three-year-old girl, in good health when she was sent to a private nursery in the morning, who had suffered a brain concussion before being picked up by her mother in the evening.¹³³ The court held that, where the evidence would call for an explanation, if the defendant refuses to explain or gives a false explanation, it is reasonably inferable that the defendant is hiding something which, more probably than not, is his negligence.¹³⁴ *Res ipsa loquitur* was also found applicable in a case where the parents of an eleven-week-old child was found to have a broken wrist after being picked up from a day care center.¹³⁵ Finally, the doctrine was applied in a case alleging injuries to a five-week-old child apparently received as the result of rat bites while under the care of a nursery.¹³⁶

While some jurisdictions have applied *res ipsa loquitur* against child development centers, others have not. The doctrine was rejected in *Helton v. Forest Baptist Church*.¹³⁷ The court ruled summary judgment was properly granted to a defendant church nursery where a two and a half-year-old infant was left under the nursery's

127. 484 So.2d 91 (Fla. App. 1986).

128. *Id.*

129. *Martin*, 188 Ga. App. 242, 372 S.E.2d 648 (1988); *Saad v. National Child Care Center, Inc.*, 612 S.W.2d 660 (Tex. Civ. App. 1981).

130. 65 C.J.S. *Negligence* 220.2 (1966).

131. BLACK'S LAW DICTIONARY 1173 (5th ed. 1979).

132. 39 Cal. Rptr. 881, 394 P.2d 697 (1964).

133. *Id.* at 882-83, 394 P.2d at 697 (1964).

134. *Id.* at 886, 394 P.2d at 702 (1964).

135. *Ward v. Forrester Day Care, Inc.*, 547 So.2d 410 (Ala. 1989).

136. *Myers v. Moore*, 240 Mo. App. 726, 217 S.W.2d 291 (1949).

137. 589 S.W.2d 217 (Ky. Ct. App. 1979).

supervision and sustained a severe injury to the right eye. No one was able to find any object that could have caused the injury and no one knew how the injury occurred. The court held *res ipsa loquitur* was inapplicable where the instrumentality producing the injury was either unknown or not in the exclusive control of the defendant.¹³⁸ Due to the divergence of opinions in various states, *res ipsa loquitur* is a theory that must be examined in every claim filed against a military child development center where the cause of the child's injuries is unexplainable.

K. Summary

In summary, analysis of claims and litigation involving military child development centers requires a thorough examination of applicable state law to determine the specific duties and the standard of care upon which tort liability may be imposed against the United States. While many of these legal issues have been discussed herein, this article is not exhaustive in light of the growing body of law pertaining to child development centers as well as the creativity of the plaintiffs' bar in pursuing new avenues for the imposition of tort liability for injuries occurring in child development centers. A final example reflecting the creativity of a plaintiff's attorney is illustrated in *Edwards v. Mt. Washington Baptist Day Care*.¹³⁹ The case involved an unsuccessful attempt to impose liability on a day care center for negligent infliction of emotional distress to the parents of a three-year-old boy who had wandered away from the center. The boy was found and returned unharmed a few hours later. The parents did not discover the incident until after their son had been safely returned; however, this did not deter them from seeking recovery.¹⁴⁰

IV. LIABILITY ARISING FROM THE LICENSING OF FAMILY HOME DAY CARE PROVIDERS

A. Statutes and Regulations Governing Family Home Day Care

The legislative history of the Military Child Care Act of 1989 expressed some of Congress' concerns about the nonavailability of child care to military members.¹⁴¹ In particular, Congressional members noted that, although there were 639 child development centers operating on military installations, tens of thousands of military children were on waiting lists.¹⁴² Many of the children on the waiting lists were being placed in the care of family home day care providers operating out of family housing located on the military installations. Additionally, some of the family home day care providers were charging higher fees than the military child development centers.

To remedy the shortage of military child development centers and the disparity in fees between the two types of child care providers, Congress included provisions in the Military Child Care Act of 1989 to ensure that appropriated funds would be made available to provide assistance to family home day care providers. This was done so that family home day care services could be provided to members of the armed services at a cost comparable to that charged by child development centers.¹⁴³ More

138. *Id.*

139. 44 Ohio App. 3d 96, 541 N.E.2d 465 (1988).

140. *Id.*

141. H.R. REP. No. 101-121, 101st Cong., 1st Sess. 307 (1989).

142. *Id.*

143. See Pub. L. No. 101-189, 1508.

importantly, the Military Child Care Act of 1989 required all family home day care providers to be "certified" by the Secretary of the military department concerned (as qualified to provide such services).¹⁴⁴ The statute did not, however, give specific guidance as to how family home day care providers were to be certified. Implementation was left to the Department of Defense (DOD).¹⁴⁵

Even before the enactment of the Military Child Care Act of 1989, the DOD implemented a regulation concerning family home day care providers operating on military installations. This regulation, DOD Instruction 6060.2, was issued on March 3, 1989.¹⁴⁶ It established several minimum requirements for the branch services to regulate family home day care providers. First, it required background "screening for all potential providers and their family members to ascertain their suitability for providing care." This included "a review of mental and criminal records" of family day care providers and a "determination of any history of drug or alcohol abuse."¹⁴⁷ Second, the regulation mandated training of potential providers in the areas of child development, health and safety, and first aid.¹⁴⁸ Third, it established fire, safety, and structural requirements for the quarters to be used by the family home day care providers.¹⁴⁹ Fourth, it required operational oversight of family home day care providers at a ratio of 1 overseer to 40 homes with periodic on-site and unannounced inspections.¹⁵⁰ Finally, it set minimum requirements pertaining to the provider's age, comprehension of English, physical and mental ability to care for children, and personal health.¹⁵¹

The service regulations for the military departments often contain additional requirements in this area. For example, AFR 215-27, which preceded both the Military Child Care Act of 1989 and DOD Instruction 6060.2, includes extensive criteria for the licensing of family home day care providers.¹⁵² The regulation requires installation commanders to establish the number of family day care homes that can operate and become licensed on an installation and prohibits the operation of unlicensed family day care homes.¹⁵³ It requires, *inter alia*, that a license applicant submit mental and physical health records and information about all family members; open the home for a variety of inspections; and undergo careful scrutiny by several base agencies, including security police, fire department, and base safety office.¹⁵⁴ Additionally, the applicant must complete a basic first aid training course, as well as six hours of education in other areas related to child care.¹⁵⁵ Furthermore, the applicant must comply with all federal, state and local laws as well as licensing and registration requirements.¹⁵⁶ All licenses issued to family home day care providers are valid for one year and must be renewed annually.¹⁵⁷

Air Force Regulation 215-27 also addresses the issue of governmental liability. It states that the family home day care provider acts "as a private business person

144. *Id.* at 1501(b)(2).

145. See generally Pub. L. No. 101-189, 1501-1509.

146. See DOD Instruction 6060.2, *Child Development Programs*, encl. 4 (Mar. 3, 1989).

147. *Id.* at para. 1.

148. *Id.* at para. 2.

149. *Id.* at para. 3.

150. *Id.* at para. 4.

151. *Id.* at para. 5.

152. See AFR 215-27, para. 66-74.

153. *Id.* at para. 67(a).

154. *Id.* at para. 67(d)-(1).

155. *Id.* at para. 67(1).

156. *Id.* at para. 68(r).

157. *Id.* at para. 66(f).

[who]. . . is responsible for payment of any claims or judgments resulting from the family day care home operation."¹⁵⁸ Before licensing, the family home day care provider must purchase a minimum of \$300,000 liability insurance coverage with the United States named as an additional insured.¹⁵⁹ On installations where day care liability insurance is unavailable, inadequate, or unreasonably expensive, the family home day care provider must sign an acknowledgment of personal liability and an agreement to indemnify the United States for any expenditures made because of the provider's activities.¹⁶⁰ When a licensed family home day care provider operates without insurance, the parents of children cared for must sign a statement of understanding that the provider is operating without insurance and that the Air Force is not responsible for the actions of the provider.¹⁶¹ Whether such a waiver of liability signed by the parent is enforceable against an injured child has not yet been tested.¹⁶²

B. Determining the Applicable Duty for Uniquely Governmental Activities

Presently, there are no reported federal court decisions addressing the liability of the United States under the FTCA for the military's activities in licensing or regulating family home day care providers. Difficulties in analysis arise from those uniquely governmental activities that are not analogous to the conduct of private individuals. Since the FTCA waives sovereign immunity only "where . . . a private person would be liable to the claimant in accordance with the law of the place of the wrong,"¹⁶³ an issue may arise as to whether such uniquely governmental activities can be compared to similar activities of a state or municipality. Courts have taken two distinct approaches when faced with this issue.

In accordance with a strict reading of the FTCA, many courts refuse to impose liability where there is not an analogous cause of action arising from the conduct of a private individual. These courts hold that such claims are not actionable under section 1346(b) of the FTCA, and that it is improper to analogize to local law pertaining to the imposition of liability for the licensing and regulatory activities of a state or municipality.¹⁶⁴ However, while an analogy cannot be drawn from local law pertaining to a state or municipal government, it is possible to analogize to other local laws applicable to private individuals such as the "Good Samaritan Doctrine."¹⁶⁵

Other courts have held to the contrary, finding that when the Federal Government engages in an activity similar to that of a state or municipal government, and local law would impose a duty on the governmental entity in connection with that activity, the United States is subject to the same state-imposed duty for FTCA purposes.¹⁶⁶ Applying this principle, some courts have even found the United States not liable,

158. *Id.* at para. 69(a).

159. *Id.*

160. *Id.* at para. 69(b).

161. *Id.* at para. 69(c).

162. See generally 92 C.J.S. *Waiver* (1955).

163. 28 U.S.C. § 1346(b).

164. See *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955) (rejected the imposition of liability on the United States in the same manner as if it were a municipal corporation, but premised liability of the United States as if it were a private person); *Schindler*, 661 F.2d 552 (under FTCA, courts must apply state law applicable to private individuals and not municipal corporations); *Proud v. United States*, 723 F.2d 705 (9th Cir. 1984) (FTCA liability must be based on a similarly situated private landowner and not a similarly situated government landowner); *Taylor v. United States*, 521 F.Supp. 185 (W.D. Ky. 1981) (the court concluded it was without subject matter jurisdiction where no analogous circumstances existed under state law where a private person would be liable).

165. *Indian Towing Co.*, 350 U.S. 61 (1955); *Sheridan*, 487 U.S. 392.

166. See *L. JAYSON*, *supra* note 91, at 217.02; *Cook v. United States*, 815 F.2d 34 (7th Cir. 1987); *Louie v. United States*, 776 F.2d 819 (9th Cir. 1985).

under the FTCA, where state law would not impose liability on a similar state governmental unit for engaging in a similar activity.¹⁶⁷

Therefore, analysis of a claim under the FTCA alleging negligence by the Government in licensing or regulating a family home day care provider must begin with an examination of the law of the jurisdiction in which the claim arose. In light of the issues set forth above, this analysis must include, at a minimum, a determination of whether the court is likely to adhere to the strict "private individual" language set forth in the FTCA or analogize to liabilities imposed on state and governmental entities. If the latter approach is taken, local law must be reviewed to determine whether the court will use a "general-duty special-duty" doctrine in assessing negligence, as set forth below. Regardless of how the court views the duties to be imposed on the Government, the discretionary function defense and general tort principles must always be examined.

C. General-Duty Special-Duty Doctrine

In jurisdictions that determine the Government's duty under the FTCA by analogy to state and municipal units, the first question to answer is whether the court will apply a "general-duty special-duty" analysis to governmental activities in licensing and regulating child care within the state. Courts have disagreed in the application of this doctrine.

[T]he general-duty special-duty doctrine . . . provides in essence that a governmental entity is not liable for torts committed against a citizen unless a special or particular duty is owed to the injured citizen. Under the doctrine a governmental entity is not liable for injury to a citizen where liability is alleged on the ground that the governmental entity owes a duty to the public in general, as in the case of police or fire protection. The courts have recognized, however, that there are instances when a citizen becomes singled out from the general population and a special duty is owed him by the governmental entity. Such a duty is established by a special relationship between the government and the citizen and the breach of that duty may result in liability for the damages suffered by the citizen. Criticism of the general-duty special-duty doctrine . . . has led some jurisdictions to reject or abandon it and to rely instead on the general common law principles of duty and foreseeability which are applied in negligence actions between private individuals.¹⁶⁸

In a Missouri case, *Jamieron v. Dale*,¹⁶⁹ the court held that employees of the Division of Family Services of Missouri did not owe a special duty to children at a day care center and granted summary judgment against the child. In this case, a child was injured in a fall from a seesaw at a licensed day care center. There was evidence that the day care center was not in compliance with a regulation requiring the surface beneath playground equipment to be composed of a resilient material. The court found that Missouri statutes and regulations placed upon employees of the Division of Family Services a duty to inspect licensed day care centers to ensure compliance with the licensing regulations. The court held that the duty to enforce the licensing regulations was a prescribed duty owed to the public at large within the purview of the public duty rule, and did not give rise to a duty only to the discrete class of children attending the day care center.¹⁷⁰

167. See *Carroll v. United States*, 488 F. Supp. 757 (D. Idaho 1980); *Ward v. United States*, 208 F. Supp. 118 (D. Colo. 1962).

168. Annotation, 38 A.L.R. 4th 1194, 1196-97 (1985).

169. 670 S.W.2d 195 (1984).

170. *Id.* at 196.

In concluding that no special duty was owed to the children, the *Jamerson* court relied on a federal district court opinion applying Missouri law in a case involving the issue of whether the Division of Family Services was liable in tort to an abused child based on allegations of failure to enforce a Missouri child abuse statute. The federal district court held such statutes did not establish a specific duty to the abused child, the breach of which would be actionable.¹⁷¹ Therefore, when a jurisdiction does not have a case directly on point for child care providers but does have tort cases involving the state's failure to enforce child abuse statutes, an analogy similar to the one made by the court in *Jamerson* may be dispositive.

A Minnesota court, in *Andrade v. Ellefson*,¹⁷² used a different method of analysis to reach a contrary result. In *Andrade*, the court found that a county owed children and their parents a special duty of care different from the duty owed to the general public. *Andrade* involved serious injuries to two infants while in the care of a privately operated day care center licensed by the county. The court observed that there is no "bright line" to distinguish the many functions in which the Government protects the general public and those instances where it assumes a special duty owed to certain members of the public.¹⁷³ The court indicated that, to make such a determination, at least four factors must be considered: (1) actual knowledge by the governmental entity of the dangerous condition; (2) reasonable reliance on specific representations of the entity; (3) a statutory duty for government protection of a particular class; and, (4) government action which increases the risk of harm.¹⁷⁴ The court added that while all four factors should be considered, all four need not necessarily be met for a special duty to exist.¹⁷⁵

In *Andrade*, a county agency, pursuant to a state licensing statute, had conducted two unannounced visits of a day care center based upon repeated reports from a neighbor about overcrowding. In both visits, the inspectors were unable to substantiate the complaints. The court found the actual knowledge requirement was, arguably, partially met in that the county received repeated notices of overcrowding.¹⁷⁶ The court also found that the parents of the injured children offered no specific acts of the county upon which they relied. It reasoned that "reliance must be based on specific actions or representations which cause the persons to forego other alternatives of protecting themselves."¹⁷⁷ Therefore, there was no evidence of the second factor of reasonable reliance. Likewise, the court found that the fourth factor had not been met because the agency's activities did not increase the risk of harm to the injured children.¹⁷⁸

The *Andrade* court stated, however, that the third factor, whether there existed a statutory duty for agency protection of a particular class, had been met and was decisive. The court based its conclusion on the language of Minnesota's Public Welfare Licensing Act which clearly mandated that small children in a licensed day care facility are members of a protected class.¹⁷⁹ The court also noted that the state legislation required agencies to conduct a comprehensive study and prepare a report to the legislature with recommendations that would "ensure a safe environment for

171. *Id.* at 196-97.

172. 391 N.W.2d 836 (Minn. 1986).

173. *Id.* at 841.

174. *Id.*

175. *Id.*

176. *Id.* at 841-42.

177. *Id.* at 842.

178. *Id.* at 843.

179. *Id.* at 842.

children."¹⁸⁰ For this reason, the court concluded that the county agency owed a special duty of care to the injured children.¹⁸¹

D. Discretionary Function

In every FTCA claim involving governmental activities in the licensing and regulating of family home day care providers, the practitioner must determine whether the acts complained of were discretionary in nature and, if so, whether recovery is precluded by the exclusion set forth in the FTCA. Section 2680(a) of the FTCA states that a governmental liability in tort will not be premised upon:

Any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion involved be abused.¹⁸²

In *Berkovitz v. United States*,¹⁸³ the United States Supreme Court reviewed the sometimes confusing development of the discretionary function exception to the FTCA. The Court held that the exception does not bar claims based upon conduct of federal agencies in violation of federal statutes, regulations, or formalized agency policy which affords the agencies and their employees no discretion.¹⁸⁴

Berkovitz set forth a two-prong test for determining when federal government activity is immune from tort liability because it is a discretionary function. The Supreme Court held that the first prong of the test will be satisfied so long as choice or judgment is involved and is *not* circumscribed by a statute, regulation, or policy specifically prescribing a course of action for the employee to follow.¹⁸⁵ Once the first prong of the test is met, the Court stated that the discretionary function exception will apply where the decision or activity is "grounded in social, economic and political policy."¹⁸⁶

Although the discretionary function exclusion has not been addressed in reported cases involving the military's activities in licensing of family home day care providers, this issue was discussed by an Oregon court in *Brasel v. Children's Services Division*.¹⁸⁷ The case presented a wrongful death action by the parents of an eighteen-month-old girl who died as a result of injuries suffered in a day care center certified by the Children Services Division (CSD), an agency of the State of Oregon. The plaintiff alleged CSD was negligent in failing properly to investigate the day care facility before issuing a certificate of approval for its operation.¹⁸⁸ The trial judge dismissed the action and an issue on appeal was whether the actions of CSD were discretionary, making CSD immune under a state statute similar to the FTCA discretionary function exclusion. The court stated:

180. *Id.*

181. *Id.* While *Andrade* is illustrative of how one jurisdiction has determined whether a special versus general duty was owed, other jurisdictions that follow the "general-duty special-duty" doctrine may not apply the *Andrade* analysis. They may consider only some of *Andrade*'s factors or may consider entirely different factors when determining whether an actionable duty exists. See generally 57 AM. JUR.2D *Municipal, County, School, and State Tort Liability*, §§ 140-44, 213 (1988).

182. 28 U.S.C. § 2680(a).

183. ___ U.S. ___, 108 S.Ct. 1954 (1988).

184. *Id.* at 1958-59.

185. *Id.*

186. *Id.* at 1960.

187. 642 P.2d 696 (Or. App. 1981).

188. *Id.* at 697.

It is clear . . . that the state enjoys immunity from tort liability when it makes a policy decision that its agency, CSD, shall have responsibility for certifying that private day care facilities operating in the state meet certain standards of health and safety. It also appears that CSD itself makes a policy decision when it establishes by rule what the criteria for issuance of a certificate of approval shall be. The division's action in adopting those standards may be immune from tort liability as a discretionary policy-making act, but at issue here is the process by which these standards were applied in the licensing of this particular facility. Without knowing more about the actual process by which the decision was made to license the day care facility where plaintiffs' daughter was injured, and without knowing how, and by whom, any subsequent decision not to halt operation was made, it cannot be said that the decisions were ones involving the making of policy, for which defendant enjoys immunity.¹⁸⁹

In *Brasel*, the appellate court reversed the dismissal of the plaintiff's complaint by the trial court and remanded. It found the state could not establish its claim of discretionary authority which would have precluded the action on grounds of sovereign immunity at the pleading stage. The appellate court, more importantly, stated "when criteria for issuance of a license have been set, negligent failure by a government agent to determine that an application satisfies the license requirements is actionable."¹⁹⁰ This holding seems consonant with *Berkovitz*.¹⁹¹

E. Traditional Tort Analysis

Evaluation of allegations of negligence by the military in licensing or regulating family home day care providers must always include an analysis of the traditional elements of tort law. This should include examination of the law of the jurisdiction on duty and standard of care, breach, causation, and damages. When reviewing the duty, the practitioner must determine whether the state would impose a duty for undertaking to perform such acts. This should include the potential for application of the "Good Samaritan Doctrine" and use of statutory or regulatory provisions to establish the standard of care against which the Government activity will be judged.

Furthermore, it must be emphasized that an action premised upon the theory of *respondeat superior* is never appropriate under the FTCA for the sole negligence of the family home day care provider. Because the providers are clearly not "employees" of the Government, the United States cannot be held liable for the providers' actions. At least two state courts have held that state licensing agencies may not be held liable for the negligence of private child care providers.¹⁹²

State courts have examined a number of circumstances in which plaintiffs have alleged that a licensing agency breached a duty to children under the care of private child care providers. Similar theories may be applicable to the United States by analogy or otherwise. Courts have reviewed, *inter alia*, the duty to close unlicensed facilities;¹⁹³ the failure properly to investigate a facility before issuing a certificate;¹⁹⁴

189. *Id.* at 698.

190. *Id.* at 698-99.

191. See also *Andrade*, 391 N.W.2d 836 (day care provider's license inspection conducted by a county was not at planning level where discretionary immunity would normally apply); *Phillips v. Thomas*, 555 So.2d 81 (Ala. 1989) (discretionary function defense applied to a children's services division's activities in the licensing, training, supervising, and inspecting of a day care center).

192. *Verret on Behalf of Gatlin v. Scott*, 470 So.2d 228 (La. App. 1985); *Sinkler v. County of Monroe*, 127 App. Div. 2d 1006, 513 N.Y.S.2d 67 (1987).

193. *Augustine v. Nusom*, 671 S.W.2d 112 (Tex. Civ. App. 1984).

194. *Brasel*, 642 P.2d 696 (1981); *Sinkler*, 127 App. Div. 2d 1006, 513 N.Y.S.2d 67 (1987).

the duty to investigate allegations of overcrowding;¹⁹⁵ the duty to investigate allegations of child abuse;¹⁹⁶ the duty properly to supervise a day care home;¹⁹⁷ the duty to ensure proper transportation;¹⁹⁸ and the duty properly to train care providers.¹⁹⁹ In addition, under the analysis of *Sheridan* and state law, liability may possibly be imposed upon the Federal Government if government employees fail to comply with federal statutes and regulations governing family home day care providers where state laws contain analogous duties. As an illustration of regulations imposing a duty on a governmental entity, the court in *Brasel* stated that:

CSD's duty to plaintiffs as prospective users of a state-certified day care facility arises statutorily . . . which places in CSD the authority to establish health and safety standards for day care centers and to ensure compliance by inspection and investigation. By alleging that defendant issued a certificate to a center which did not meet these qualifications, and that plaintiffs subsequently entrusted their daughter to that center, plaintiffs have sufficiently alleged both a duty owed to them as members of the protected class and a breach of that duty.²⁰⁰

The analysis of proximate causation will be particularly important in claims and litigation alleging governmental negligence. In the licensing and regulating of family home day care providers, the Government will only be liable if its negligence is a proximate cause of a child's injuries. For this reason, the Government may not be liable in many cases where the family home day care provider is guilty of negligence. For example, suppose that a child in the care of a family home day care provider is injured during horseplay with other children at the home because the provider failed adequately to supervise the children. Further, suppose that the installation upon which the provider is operating has a regulation limiting a single family home day care provider to caring for no more than six children.²⁰¹ If the provider is permitted to care for fifteen children, in violation of the regulation, this regulatory violation arguably would be the proximate cause of the child's injury from horseplay, because the regulation was intended to ensure proper supervision of the children. However, if the provider was caring for no more than the number of children authorized in the regulation, the injured child might have difficulty establishing that the injuries were proximately caused by a violation of the regulation.²⁰²

F. Summary

The few cases involving allegations of governmental negligence relating to the licensing or supervision of family home day care providers teach us that it is imperative carefully to examine applicable federal and state laws, as well as regulations or instructions promulgated by the DOD, the service licensing the provider, and the installation where the alleged accident took place. A careful evaluation of relevant laws and regulations will enable the practitioner to determine whether a special or general duty of care was owed to an injured child, whether a duty was breached, and whether the discretionary function defense may be asserted. Proximate causation will always play a key role in the analysis of these cases.

195. *Andrade*, 391 N.W.2d 836.

196. *Brasel*, 642 P.2d at 696.

197. *Verret*, 470 So.2d 288.

198. *Sinkler*, 127 App. Div. 2d 1006, 513 N.Y.S.2d 67 (1987); *Gagnon v. State of Rhode Island*, 570 A.2d 656 (R.I. 1990); *Jamerson*, 670 S.W.2d 195 (1984).

199. *Phillips*, 555 So.2d 81.

200. *Brasel*, 642 P.2d at 698.

201. AFR 215-27, at para. 68(h).

202. *Id.*

V. CONCLUSION

The military, a microcosm of our society, is faced with increasing potential of liability arising from the provision of child care services on military installations. Congress has mandated, in the Military Child Care Act of 1989, that the military services provide members with quality child care, at affordable prices, meeting specific standards to ensure that the children are cared for in a safe, secure environment.

In this era of an aware and litigious society, when the United States Government owns and operates hundreds of child development centers and certifies countless family home day care providers, it is highly probable that the incidence of federal tort claims arising from these activities will continue to rise. It is human nature to place blame whenever an injury occurs. This reaction is magnified when the harm occurs to our most precious resource—a small child. When parental hurt is matched with the creativity of the plaintiffs' bar and the attendant publicity generated by such cases, the potential for litigation increases dramatically.

The sole objective of this article has been to familiarize the practitioner with the emerging substantive law of the FTCA in cases arising out of child care services. With this overview in mind, the attorney should be better prepared when consulting the appropriate statutes, judicial decisions, and regulations in every case.

State Law Requirements for Reporting Suspected Child Abuse – Must We Comply?

LOREN S. PERLSTEIN

This article will examine state law requirements for reporting suspected child abuse, and will attempt to resolve the issue of whether the Air Force, as an agency of the Federal Government, is obligated to comply with such statutes. It will provide information to claims officers responsible for investigating claims where it is alleged that some harm resulted from the failure to report suspected child abuse. The number of Federal Tort Claims Act claims alleging negligence in the failure of Air Force employees to comply with child abuse reporting requirements has been increasing.¹ Therefore, it is important to understand the law concerning these requirements.

An Air Force regulation and Department of Defense (DOD) directive require the reporting of suspected cases of child maltreatment to the local public child protective agency for installations in the United States and, where covered by agreement, outside of the United States.² These regulations are based on the Air Force policy of enhancing the health and well-being of Air Force families and are not in response to the dictates of state reporting requirements. While this difference may appear to be esoteric, it may have far-reaching impact on the way we investigate and defend against claims resulting from the alleged failure of Air Force members to comply with Air Force regulations.

As a general rule, the vast majority of child abuse cases are discovered by medical personnel during what is purported to be routine medical treatment. Federal hospital facilities are not normally subject to state regulations or law.³ For example, while most military health care providers must possess valid licensure, they need not be licensed in the particular state where assigned.⁴ Of course these prohibitions are not restricted to the area of hospital facilities. The Federal Government is immune from most state taxation as well as inspection, license, and permit fees.⁵

I. EXCLUSIVE FEDERAL JURISDICTION

A brief discussion of the history of the doctrine of exclusive legislative jurisdiction will aid in understanding why so much confusion still exists in this area. The power to exercise exclusive legislative jurisdiction over federal properties was granted to Congress by the United States Constitution.⁶ Although the grant appears clear and unambiguous, the application of the doctrine by the courts as it relates to the exercise of legislative power by the states suggests otherwise.

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1. 28 U.S.C. § 2675.

2. Department of Defense (DOD) Directive 6400.1. *See also* Air Force Reg. (AFR) 160-38.

3. *Paul v. United States*, 371 U.S. 245, 304 (1963).

4. DOD Directive 6025.6. *See also* AFR 168-13.

5. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Jaybird Mining Company v. Weir*, 271 U.S. 609, 613, (1926).

6. U. S. CONST., art. I, § 8, cl. 17.

The rationale for exclusive legislative jurisdiction was explained by Madison in *The Federalist Papers*:

The necessity of a like authority over forts, magazines, etc. established by the General Government, is not less evident. The public money expended on such places, and the public property deposited in them, require that they should be exempt from the authority of the particular state. Nor would it be proper for the places on which the security of the entire Union may depend to be in any degree dependent on a particular member of it.⁷

While it appears that states could reserve authority over private civil matters in the cession documents, few did.

The early cases applied a very strict interpretation to the doctrine of exclusive jurisdiction. Unless the state reserved some authority in the original conveyance documents, the Federal Government assumed all judicial, executive, and legislative power over the property.⁸ More recently, the cases have exhibited a more accommodating approach. As long as the exercise of jurisdiction by the state does not interfere with federal activities, it will not automatically be ruled out.

In *Howard v. Commissioner*⁹ the Supreme Court dismantled the "state within a state" concept. Provided no interference with the exercise of jurisdiction by the Federal Government is involved, a state is free to exert its authority over the area. In areas where the Federal Government has shown no interest and passed no legislation, such as domestic relations, there would be no interference if the state exercised its authority. This has come to be known as the "interference" test. In *Adams v. Londree*,¹⁰ for example, the court concluded that residual jurisdiction is retained by the state as to those matters constituting no impediment or interference with federal matters.

The cases subsequent to *Howard* have been less than consistent. In *Paul v. United States*,¹¹ a case involving the enforcement of California's minimum milk price regulations, the court ruled that the state could enforce its regulations so long as they do not interfere with federal law or regulation. Yet in the later case of *United States v. Mississippi Tax Commission*,¹² a case involving attempts by the state to tax liquor sold on base, the court once again retreated to a very strict interpretation of "exclusive" legislative power, holding that state regulations are barred without specific federal legislation.

There remains considerable confusion in this area. With some certainty, though, one can conclude that where there is no state interference with federal objectives and, more importantly, where state and federal objectives are in harmony, the courts will enforce state law and regulation.

II. FEDERAL LAW REGARDING CHILD ABUSE

The case law reveals the need to determine to what extent, if any, the Federal Government has legislated in the area of child abuse prevention. Under the "interference" test discussed in *Howard*,¹³ if the Federal Government has legislated in the area, a determination must be made as to whether any co-existing state legislation conflicts or interferes with the federal legislation.

7. THE FEDERALISTS No. 42 (J. Madison).

8. *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Western Union Tel. Co. v. Chiles*, 214 U.S. 274 (1909).

9. 344 U.S. 624 (1953).

10. 139 W. Va. 748, 83 S.E.2d 127 (1954).

11. See *Paul*, 371 U.S. 245 (1963).

12. 412 U.S. 363 (1973).

13. See *Howard*, 344 U.S. 624 (1953).

A review of the United States Code reveals approximately eighty statutes dealing in one way or another with child abuse. This includes statutes dealing with abused children on Indian reservations,¹⁴ criminal penalties for sexual abuse of children,¹⁵ and Public Health and Welfare grants for studies relating to alcohol-related child abuse.¹⁶

The most enlightening statute involves grants to states for child abuse and neglect prevention and treatment programs.¹⁷ Under that statute, in order for a state to receive federal funds for purposes of developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs, the state must have in effect a law relating to child abuse and neglect. The law must contain provisions for the reporting of known and suspected instances of child abuse and neglect as well as provisions for immunity from prosecution for those who report. Once reported, immediate steps must be taken to protect the health and welfare of the abused or neglected child and of any other child under the same care who may be in danger of abuse or neglect. The statute also requires states to have in effect procedures, personnel trained in child abuse and neglect prevention and treatment, and institutional and other facilities to deal with the problem. State law must contain provisions for the cooperation of law enforcement officials, courts of competent jurisdiction, and appropriate state agencies providing human services.

It may be inconsistent to argue that the exercise by a state of its jurisdiction on a federal enclave pursuant to the above statute would interfere with any stated federal interest. The federal interest in reporting is clear and the state statute is the vehicle which the Federal Government chose to use in carrying out that policy.

III. STATE STATUTES UNDER THE FEDERAL TORT CLAIMS ACT

While Air Force personnel are obligated to report suspected child abuse under Air Force regulations, it may be wise not to acquiesce in the position that the report is made because state law mandates it. The Federal Tort Claims Act, (FTCA),¹⁸ under which tort actions are brought against the United States, specifically provides:

The district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The FTCA does not create a substantive cause of action against the United States but rather accepts liability under circumstances where it would be imposed on private individuals under similar circumstances. Therefore, the initial question is whether a cause of action exists under state law.

If, under state law, the negligent act or omission would be regarded as negligence *per se*, then that rule would apply to the United States. In *Lutz v. United States*,¹⁹ a servicemember failed to control his dog which bit and injured a child. The incident was in violation of both a Montana statute and Air Force regulation. The violation of the statute that was enacted for the protection of the public was considered negligence *per se*.

14. 25 U.S.C. § 18.

15. 18 U.S.C. § 109A.

16. 42 U.S.C. § 6A.

17. 42 U.S.C. § 5106A.

18. 28 U.S.C. § § 1346(b), 2671-80.

19. 685 F.2d 1178 (9th Cir. 1982).

Thus, if we accept the suggestion that the United States must comply with state statutes mandating the reporting of suspected child abuse, we risk the chance that the failure to do so will result in a cause of action under a negligence *per se* theory. Of course, based on such cases as *Lutz*, it may make little difference because DOD Directive 6400.1 and Air Force Regulation 168-38 mandate the reporting of suspected child abuse to local child protective agencies.

IV. INVESTIGATING THE CLAIM

Whether the theory of recovery is one of negligence *per se* or is based on more traditional tort principles, there is much we can do to defend against such claims. Under a negligence *per se* theory of recovery, no liability will be imposed unless such negligence is the proximate cause of the injuries.²⁰ Under traditional tort principles, one must show four elements: duty, breach, injury, and proximate cause. The claims officer should investigate the claims with these elements in mind.

As a starting point, review the statute in the local jurisdiction carefully. Determine whether it includes penalties for noncompliance or purports to create a cause of action for failure to comply. Perhaps more importantly, determine what steps are taken by the local authorities once a report is made. What wheels start turning? Find out what type of intervention takes place. Determine whether the abused child automatically receives any therapy or counseling, and whether similar provisions exist for other family members or the abuser.

The real purpose of the above inquiry is to determine the standard of care in the local jurisdiction with regard to abused children. The United States is liable to the same extent and in the same manner as a private individual under like circumstances. Therefore, the United States is held to the same standard as a private individual.

Once it is determined what would have happened had the local authorities been notified, the inquiry should turn to what was actually provided to the child by government or private sources. While most civilian child protective agencies have more resources to deal with abused children than does the Air Force, it is possible that the military authorities provide similar services as those available from the state. In this way, we may be able to show that the standard of care was met even though no report was made.

Next, turn to the question of injury. Determine from the claimant the nature of the alleged injury. If the claimant is alleging that, because no report was made to state authorities, the abuse was allowed to continue, defense may be difficult. If, on the other hand, the allegation is that some sort of psychological harm resulted from the failure to report, evidence of the harm should be demanded. A complete set of medical records, including records of counseling subsequent to the time when the report should have been made, must be gathered.

V. CONCLUSION

The determination of whether the Air Force is obligated to report suspected child abuse is not subject to easy resolution. Under most circumstances, local civilian authorities are in a better position to help in a situation of child abuse, especially where the family lives off the installation. The state is more likely to have the resources and manpower to deal with the problem effectively. It is reasonable to

20. *Beesley v. United States*, 364 F.2d 194 (10th Cir. 1966) involved a government vehicle stopped out of gas on a highway in violation of an Oklahoma statute.

want to take advantage of those resources. As stated in the DOD directive on the subject, the purpose of reporting the suspected abuse is to ensure that any further trauma to the victim(s) is minimized.²¹

On the other hand, it may be in the best interest of the United States to argue that reporting is discretionary, and that the doctrine of sovereign immunity insulates the United States from the burden of complying with state statutes. While the cases are conflicting, it would appear that under the "interference" test the courts would likely find no interference in the case of statutes requiring the reporting of suspected child abuse. In fact, both state and federal laws are in harmony in the desire to eliminate such harm.

21. 28 U.S.C. § 2675.

Statute of Limitations Issues in Environmental Torts Against the Federal Government

JUDITH B. REGAN

Environmental torts are claims for any wrongful injury or property damage resulting from exposure to hazardous or foreign substances. This fast-growing area of the law presents several unique challenges for all parties, such as proving causation, quantifying damages, and determining when the statute of limitations begins to run.

In re Agent Orange Product Liability Litigation,¹ perhaps the most widely known toxic tort case, acknowledged these difficult hurdles. There the court pointed out that "the clear weight of scientific evidence casts grave doubt on the capacity of Agent Orange to injure human beings."² The court went on to say that proving a causal link between exposure and the plaintiffs' ailments was:

insurmountable . . . The difficulties in excluding known causes, such as undetected exposure to the same or similar toxic substances in civilian life, and the conceded existence of unknown causes might make it difficult for any plaintiff to persuade a trier of fact as to Agent Orange's guilt. Causation is nevertheless an absolutely indispensable element of each plaintiff's claim.³

These were factors weighed by all parties in deciding to enter into a pretrial settlement.

The Federal Tort Claims Act (FTCA)⁴ is the only avenue available to a plaintiff seeking to file suit against the Federal Government for compensation for personal injuries or property damage. "The United States as sovereign, is immune from suit save as it consents to be sued . . ."⁵ The FTCA is a limited waiver of sovereign immunity. It does not create new substantive rights, but permits suits against the sovereign for damages resulting from the negligent acts or omissions of its employees.

Congress, in passing this legislation, refused to say what would constitute a cause of action; however, it did set forth the time within which to bring suit. Congress left it to state law to determine whether a cause of action exists and simply set forth in the FTCA how and when the plaintiff must bring the suit. The legislative intent was to have a single statute of limitations governing tort claims against the Federal Government.

The statute of limitations for suits provision of the FTCA reads,

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.⁶

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1. 818 F.2d 145 (2d Cir. 1987).

2. *Id.* at 149.

3. *Id.*

4. 28 U.S.C. § 2671.

5. *United States v. Sherwood*, 312 U.S. 584 (1941).

6. 28 U.S.C. § 2401(b).

Although there have been no rulings to the contrary,⁷ the general rule is that federal law, not state law, governs when a claim accrues. In *Quinton v. United States*,⁸ the Fifth Circuit was called upon to decide whether federal or state law determined the time of accrual. The court pointed out that if state law were used to determine accrual, then the Congressional intent of establishing a uniform statute of limitations would be frustrated. Applying the various state determinations of when a claim accrues would permit the states to alter the FTCA provision by either extending or delaying the commencement of the statute of limitations, thus frustrating the legislative purpose. The Fifth Circuit held that federal law controls time of accrual.⁹

For simple torts such as automobile accidents or slip-and-falls, the point when a "claim accrues" is easily ascertainable; it is the date of the accident or injury. At that point the cause of action is complete and the two-year limitations period begins to run. But for other causes of action, such as environmental torts, the determination of when the claim accrues is not so easy. For example, consider a situation in which a person claims that his well water has been contaminated and that because he has been drinking this water for years, he is now injured. Does the claim accrue when the contamination is first discovered; when the last drink of water was taken; when the plaintiff suspects the cause of his injuries; or when a doctor states that the injuries were caused by the well water? As another example, a person claims that exposure to new and unique substances at the workplace over the years has caused personal injuries. At what point does the two-year limitations period begin to run: at the time of exposure; the time the injury manifested itself; or the time that the plaintiff is finally able to locate a professional to testify that the exposure caused the damage?

The first major inroad or exception to the "two years from date of injury" rule came about in medical malpractice cases. In *Ashley v. United States*,¹⁰ the issue before the Ninth Circuit was whether the plaintiff's claim was barred by the statute of limitations. The plaintiff had filed an action under the FTCA for medical malpractice allegedly committed four years before the lawsuit was filed. In the course of medical treatment, he had a blood sample drawn from his arm at a Veterans Administration (VA) hospital. The procedure was performed incorrectly, immediately causing pain and swelling. He returned the following day for treatment and was told that a nerve had been hit in his arm and that he should receive whirlpool baths. He claimed that the doctors told him that his reaction was a rare occurrence and that previous incidents had not resulted in permanent damage. Two years later, after receiving continuing treatment, he claimed he received a letter from the VA that, for the first time, indicated that his injury was permanent. He alleged that the two-year statute of limitations began to run from this point, the day on which, for the first time, he knew that his injury was permanent.

The court disagreed, holding that on the day of the blood test, the plaintiff knew of the acts constituting the malpractice and, within a day or two thereafter, if not at the same time, he knew he had been injured and that it had not been expected. The court pointed out that for medical malpractice cases, an exception of sorts had been carved out of the strict guidelines of 28 U.S.C. § 2401(b), such that the claim accrues when a plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the malpractice.¹¹ Ashley had not exercised the reasonable

7. See *Hau v. United States*, 575 F.2d 1000 (1st Cir. 1978); *Tessier v. United States*, 269 F.2d 305 (1st Cir. 1959).

8. 304 F.2d 234 (5th Cir. 1962).

9. *Id.* at 235.

10. 413 F.2d 490 (9th Cir. 1969).

11. *Id.* at 492, citing *Hungerford v. United States*, 307 F.2d 99 (9th Cir. 1962); *Brown v. United States*, 353 F.2d 578 (9th Cir. 1965).

diligence one would expect from an adult. The Ninth Circuit refused to hold that the statute of limitations does not begin to run until the plaintiff becomes "knowledgeable as to the precise extent of the damage resulting from the [known] tort"¹²

The use of the "discovery rule" in medical malpractice cases as the point at which to commence the running of the statute of limitations was sanctioned by the Supreme Court in *United States v. Kubrick*.¹³ There, the plaintiff suffered injuries from the administration of a medication. He was told by a doctor that it was highly possible that the medicine had caused his injury. Several years later, another doctor told him that the medicine should not have been administered. Kubrick argued that it was not until he received this second piece of information that the statute of limitations began to run. The court disagreed, holding that at the time Kubrick spoke with the first doctor, he was aware of both his injury and its cause. It was not necessary to be aware of the legal implications of the defendant's acts.¹⁴ *Kubrick* has been the only Supreme Court interpretation of 28 U.S.C. § 2401(b).

In *Sexton v. United States*,¹⁵ the implications of *Kubrick* were before the D.C. Circuit in a case involving a child who allegedly received the wrong type of medical treatment and later died from leukemia. The plaintiffs alleged that the doctors used an experimental course of treatment rather than a more reliable course, a fact that plaintiffs only learned about years after the death. They argued that they should not be subject to the commencing of the statute of limitations at the time of death, because they expected that their son would die of leukemia and this thwarted their detection of the negligence. The court rejected this argument and applied *Kubrick*. The plaintiffs had a duty to investigate whether they had a cause of action once they know the historical facts associated with the injury. The plaintiffs did not have to know the character of the Government's omission, only the injury and its cause.¹⁶ The court rejected the argument that, because plaintiffs expected their son to die from the leukemia, that they had no reason to inquire into the character of the Government's treatment of their son after his death, and thus the statute of limitations should not begin to run. Accepting this theory would defer the running of the statute on a broad range of claims and would generate intractable factual disputes as just how dismal a prognosis must be to bring a plaintiff within the rule's shelter.¹⁷ The plaintiffs must seek information "to evaluate known facts" to discover the Government's omission and, therefore, the statute began to run at the time of death.

Medical malpractice cases provide perhaps the best if not the only guidance into interpreting 28 U.S.C. § 2401(b) in environmental tort cases. Very few of this type of case have reached the courts for decisions. In *re Agent Orange Product Liability Litigation*,¹⁸ one of the first toxic tort cases and a frequently cited case, was a decision approving an out-of-court settlement, although the court mentioned in *dicta* that the statute of limitations would have been one of the many difficult decisions had the case gone to trial.

The vaccine cases provide an analogy. In *Davis v. United States*,¹⁹ the plaintiff alleged he contracted polio after receiving the oral polio vaccine as part of the Government sponsored campaign to administer the vaccine nationwide. Plaintiff became paralyzed shortly after taking the vaccine, and filed suit against the

12. *Ashley v. United States*, 413 F.2d 490, 493 (9th Cir. 1969).

13. 444 U.S. 111 (1979).

14. *Id.* at 120-22.

15. *Sexton*, 832 F.2d 629 (D.C. Cir. 1987).

16. 832 F.2d 629, at 633-34.

17. *Id.* at 635.

18. 818 F.2d 145 (2d Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 695 (1988).

19. 642 F.2d 328 (9th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982).

manufacturer. In the course of discovery, plaintiff depose a government doctor who testified that the particular batch of vaccine had been tested by a single test and the results were acceptable. Years later plaintiff learned that, in fact, that batch of vaccine had been subjected to a second test that had unacceptable results. Davis then filed an FTCA action arguing that his claim did not accrue until he learned of the Government's responsibility for his injury. The Ninth Circuit, citing *Kubrick*,²⁰ rejected this argument, stating that the statute does not wait until the plaintiff is led to believe negligence. A claim accrues when the plaintiff is aware of his injury and the likely cause of the injury. It is up to the plaintiff to determine within the two years whether to sue.

A similar rationale was followed by the D.C. Circuit in *Swine Flu Immunization Products Liability Litigation, Kenneda v. United States*,²¹ a case addressing the issue of when a reasonable person should know the cause of his injury. Plaintiff sued the Government because she contracted Guillain Barre Syndrome (GBS), after ingesting a government sponsored swine flu vaccine. Her illness was first diagnosed four years after receiving the vaccine, and not until five years after that did a physician first tell her that her illness might be the result of the vaccine. She did not file suit until two years after receiving that piece of information. She argued that despite her inquiries, the doctors did not tell her the cause of her problem until two years before filing suit. The Government argued that even if plaintiff did not know the cause of her injury, she should have known, because a reasonably diligent person would have known it. The court applied the discovery rule to determine when the claim accrued. Finding that the plaintiff acted as a reasonably diligent person would, it accepted her argument concerning when the statute of limitations began to run.

In *Stoleson v. United States*,²² the plaintiff claimed she was injured by her exposure to nitroglycerin at her job in an ammunition manufacturing plant. The Seventh Circuit was faced with the issue of whether the discovery rule applied outside of the medical malpractice area. The plaintiff, Mrs. Stoleson, began to suffer angina-type chest pains on the weekends. These pains gradually worsened to the point she was hospitalized several times. Mrs. Stoleson suspected since 1968 that the attacks were related to her job, but she was repeatedly told by the company doctor that there was no connection. In 1969, a safety inspector told her that he believed her heart problems were connected to her occupational exposure to nitroglycerin, but that he was unaware of any medically recognized connection. In 1971, a new doctor told Mrs. Stoleson that her pains were the result of her exposure to nitroglycerin. This doctor shortly thereafter published an article documenting for the first time the connection between chronic exposure to nitroglycerin and angina-type chest pains. Mrs. Stoleson filed suit shortly thereafter, arguing that her claim did not accrue until she had medical confirmation of her suspicions. The court agreed, rejecting the Government's argument that the claim accrued either when she first suspected the connection, or alternatively when the safety inspector agreed with her suspicions. In holding that the claim was not time-barred, the court recognized that defendants in such cases may be burdened to answer for "some long-forgotten conduct that medical science recognizes only years later to be harmful."²³ But the court said that the Government had long been aware of the safety factors when using nitroglycerin in an occupational setting. Because it had breached this duty, the Government should not be able to shirk its responsibility by stating that it would be unduly burdensome to defend against stale claims such as this one. The

20. 444 U.S. 111 (1979).

21. 880 F.2d 1439 (D.C. Cir. 1989).

22. 629 F.2d 1265 (7th Cir. 1980).

23. *Id.* at 1271.

statute of limitations did not begin to run until Mrs. Stoleson had evidence of the missing critical factor – causation.²⁴

In the case of *In re Swine Flu Products Liability Litigation*,²⁵ the issue before the Ninth Circuit was whether to extend the medical malpractice discovery rule to a wrongful death case. Pointing out that the circuits are split on this issue, the court held that the discovery rule should be applied to determine when the claim for wrongful death accrued. The determination of when the plaintiff should have discovered the cause of his wife's death is a question for the fact finder, who may consider whether the plaintiff acted reasonably in relying on the coroner's assurances that his wife's death was not caused by the swine flu vaccine.

The Supreme Court early on recognized the possible harsh applications of the time bar when the injury is slow in manifesting itself. In *Urie v. Thompson*,²⁶ a case not involving the Federal Tort Claims Act, the plaintiff sought compensation for his silicosis, contracted from long-term exposure to silica dust on his job. The Court had to decide when the claim accrued: Was it when the plaintiff first contracted the illness, even though it was latent for many years thereafter? Was it when he took his last breath of silica dust? Or was it when the plaintiff was diagnosed as having silicosis? The Court held it was when the plaintiff was finally diagnosed, pointing out:

no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently, the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substances manifest themselves ²⁷

To hold otherwise would frustrate the legislative purpose of every humane piece of legislation, because it would mean that "at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs. . . ." ²⁸ Therefore, the claim accrued when his illness was finally diagnosed, and the claim was not time barred.

In *Steele v. United States*,²⁹ a worker sued under the FTCA for injuries received when he was installing runway lights at an airport. He was instantly injured but did not file his FTCA claim until more than two years after the injury. He argued that, because he did not learn until much later of the Federal Aviation Administration's involvement in leaving on the electric current and failing to warn the plaintiff, the two years should not begin to run at the time of injury. Pointing out that federal law controls when the claim accrues,³⁰ the Seventh Circuit held that when the injury coincides with the negligent act and some damage is discernible, the statute begins to run immediately. When the injury is apparent, the plaintiff has a duty to discover the negligent acts and file the claim within two years.³¹

A similar holding was rendered by the Ninth Circuit in *Dyniewicz v. United States*,³² where plaintiffs sued more than two years after their parents were killed in a flood

24. *Id.* at 1271.

25. 764 F.2d 637 (9th Cir. 1985).

26. 337 U.S. 163 (1948).

27. *Id.* at 170, citing *Associated Indemnity Corp. v. Industrial Accident Commission*, 124 Cal. App. 378, 381.

28. *Id.* at 169.

29. 599 F.2d 823 (7th Cir. 1979).

30. The court points out that whether the discovery rule controls when a claim accrues in nonmedical malpractice cases has received differing conclusions, including conflicting Air Force and Army regulations defining time of accrual. *Id.* at 827, n.7.

31. *Id.* at 828.

32. 742 F.2d 484 (1984).

that swept their car off the road. The plaintiffs argued that the statute of limitations did not begin to run until they learned of the National Park Service's involvement (in terms of failing to close the road). The court disagreed, holding that at the time of death, plaintiffs knew of both the injury and its cause, the flood. The statute is not tolled until the plaintiffs learn of the Government's involvement; the Government has no duty to tell the world of its negligent acts.

In *Zelevnik v. United States*,³³ the Third Circuit further explained that even if plaintiffs would not have learned of the Government's involvement when they made a reasonably diligent investigation of the cause, the statute was not tolled. In rejecting such a reasonableness standard, the court stated that the statute of limitations is to be applied in a uniform manner. It begins to run from the time the injured party knows of his injury and its immediate cause.

These cases point out some of the statute of limitations issues that may arise in toxic tort cases. Plaintiffs may know of their injury but not its cause, or they may know its cause but not the Government's involvement, or the injury may not even manifest itself until years after the alleged negligent act. Although the facts of each toxic tort suit will be different, the case law seems clear that the claim accrues when the plaintiff is aware of both his injury and its immediate cause. However, determining exactly when this is in toxic tort litigation may be difficult.

33. 770 F.2d 20 (1985), *cert. denied*, 475 U.S. 1108 (1986).

Status of Forces Agreements as Exclusive Claims Remedies

FRANCIS B. VAN NUYS

I. INTRODUCTION

One of the first decisions a claims officer has to make in processing a claim is under which statute, from among a number of possibilities, to process it. The choice is an important one, because a claim that is payable under one statute may not be payable under another. In some circumstances, the choice may affect whether the claim will have to be sent to another military service.

Each statute carries its own unique administrative approval process and levels of authority. Often the choice is simplified by exclusions contained within the language of the claims statute itself. For example, the Military Claims Act¹ prohibits its use if the claim is payable under the Federal Tort Claims Act² or the Foreign Claims Act.³ In other cases, the Air Force Regulation (AFR) implementing the claims statute may provide additional prohibitions. The Air Force Claims Regulation, AFR 112-1,⁴ contains a list of six claims statutes that have priority over the Military Claims Act.⁵

The problem is often more difficult where claims arise in a foreign country with which the United States has agreed to procedures for sharing the costs of claims as part of a status of forces agreement (SOFA). Issues can arise as to whether the claims provisions in a SOFA takes precedence over other possible claims statutes, generally the Foreign Claims Act or the Suits in Admiralty Act⁶ and the Public Vessels Act.⁷

This article will examine this issue on choice of remedies as it applies to the Air Force SOFAs with the North Atlantic Treaty Organization (NATO) countries, Japan, and Australia. These countries were picked because the Air Force has single service claims responsibility for handling most claims generated by any Department of Defense (DOD) agency in Japan, Australia, and a number of NATO nations.⁸ Does the claims officer have the unfettered right to chose one procedure over another? Can the claimant demand one claims statute over another? Does the Air Force have the right to issue regulations specifying a priority of claims procedures? Because most claims are handled administratively or because there is no right to a hearing in court, few court decisions exist to provide guidance. This article will attempt to provide some answers.

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1. 10 U.S.C. § 2733.

2. 28 U.S.C. §§ 2671-80.

3. The Foreign Claims Act, 10 U.S.C. § 2734; the portion of the Military Claims Act containing the prohibitions, 10 U.S.C. § 2733(b)(2).

4. For the regulatory portions of Air Force Reg. (AFR) 112-1, see 32 C.F.R. § 842.

5. See AFR 112-1, para. 7-11a; 32 C.F.R. § 842.50(oo).

6. 46 U.S.C. §§ 781-90.

7. 46 U.S.C. §§ 741-52.

8. See Department of Defense Directive 5515.8. For a complete list of country assignments and addresses of sending State offices, see AFR 112-1, Figures 2-1 and 2-2. The directive does not assign claims responsibility for claims under the Military Personnel and Civilian Employees' Claims Act, 31 U.S.C. §§ 3701, 3721, or admiralty cases not specifically covered by an international agreement.

II. THE NATO CLAIMS COST SHARING FORMULA

To understand the significance of the problem, one should be familiar with the system of processing claims under the United States SOFA with NATO and under most other SOFAs. The NATO Status of Forces Agreement (NATO SOFA)⁹ signed 19 June 1951 and entered into force for the United States on 23 August 1953, contains a new comprehensive scheme for dealing with claims involving defense service personnel from one country stationed in the country of another.¹⁰ Article VIII of the NATO SOFA covers three types of claims: (1) country-to-country claims; (2) official duty and legally responsible claims; and (3) claims not arising from official duty.

There are two varieties of country-to-country claims. The treaty grants a complete waiver of liability to each party to the treaty for damage caused to another's military property, and for death and injury caused to another's defense service personnel.¹¹ A partial waiver exists for damage to another's nonmilitary, government-owned property. Claims for less than \$1400 (or the equivalent in foreign currency) to nonmilitary property are waived. Damage costs to nonmilitary property above \$1400 (or equivalent) are shared 75/25 percent in the manner described below for official duty and legally responsible claims.¹²

Article VIII, paragraph 5, of the NATO SOFA contains the provisions for adjudicating the second claim type, official duty or legally responsible claims. Such claims are those arising out of acts or omissions of members of a force¹³ (military personnel) or civilian component¹⁴ (civilian employees) belonging to the visiting country (the sending State) done in performance of official duty, or from other acts for which the visiting country is legally responsible¹⁵ and results in damage or injury to third parties¹⁶ in the territory of the host nation (the receiving State). The introductory portion of Article VIII, paragraph 5, reads:

5. Claims (other than contractual claims and those to which paragraphs 6 and 7 of this Article apply) arising out of acts or omissions of members of a force or civilian component done in the performance of official duty, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage in the territory of the receiving State to third parties other than any of the Contracting Parties, shall be dealt with by the receiving State in accordance with the following provisions:¹⁷

The injured third party files these claims with the host country, not with the country whose personnel caused the injury or damage. The host country adjudicates the claim under its own laws as though the claim was caused by one of its own personnel, and pays the claimant. Every six months, the host country bills the nation whose personnel caused the damage or injury for seventy-five percent of the amount

9. 4 U.S.T. 1792; T.I.A.S. 2846. The full title of the treaty is "Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces."

10. See Mullins, *The International Responsibility of a State for Torts of Its Military Forces*, 34 MIL. L. REV. 59 (1966).

11. See NATO SOFA, art. VIII, paras. 1 and 4.

12. See NATO SOFA, art. VIII, para. 2.

13. See NATO SOFA, art. I, para. 1(a) for definition of a "force."

14. See NATO SOFA, art. I, para. 1(b) for the definition of a "civilian component."

15. Generally under automobile ownership responsibility laws or under the doctrine of *respondet superior*.

16. The term "third parties" is not defined in the treaty, and those people who are included as third parties vary from country to country.

17. 4 U.S.T. 1792; T.I.A.S. 2846.

paid.¹⁸ Thus, the injured party, usually a local national, has the benefit of having the claim adjudicated under his local law, in return for which the host country absorbs twenty-five percent of the cost. The country whose force or civilian component caused the tort only pays seventy-five percent of the cost, but loses control of deciding both liability and quantum of damages.

The third type of claim, those for acts or omissions not done in the performance of official duty, are covered by the provisions of Article VIII, paragraph 6. The host nation can investigate these claims and prepare a report for the sending nation. The sending nation decides whether it will make an *ex gratia* payment, and if so, in what amount.¹⁹

The NATO claims formula has proven extremely successful. Today, the 75/25 cost sharing ratio and other aspects of the NATO claims provisions are found in Article XVIII of the Japan SOFA,²⁰ in Article 12 of the Australia SOFA,²¹ and in Article XXIII of the Korea SOFA.²²

The claims provisions contained in the SOFAs are not self-implementing, but rather require specific Congressional enactments to grant public officials the authority either to make reimbursements or payments outlined in the agreements.²³ The International Agreement Claims Act²⁴ provides the authority specified in NATO SOFA, Article VIII, paragraph 5, to make the seventy-five percent reimbursement to our NATO allies, or to pay the whole claim initially in the United States subject to a seventy-five percent reimbursement. The Foreign Claims Act²⁵ is the authority used to make *ex gratia* payments such as are provided for in Article VIII, paragraph 6, of the NATO SOFA.

III. PRACTICAL EFFECT OF APPLYING SOFA OR OTHER CLAIMS PROCEDURES

The practical differences center on who controls the decision on liability and the amount of damages paid, what chain of command to follow in approving the claim, who has authority to approve a claim, and the amount of U.S. Government funds expended. Under the SOFA provisions, the receiving State controls the decision on both liability and quantum. The decision by the receiving State is "binding and conclusive" upon the sending State.²⁶ Despite the "binding and conclusive" provision, the SOFA bills submitted for payment are reviewed for correctness prior to payment. As a practical matter, the sending State cannot challenge the receiving State's finding of facts, interpretation of its own law, or quantum. Challenges are usually

18. NATO SOFA, art. VIII, para. 5, subparas. (a) through (e).

19. NATO SOFA, art. VIII, para. 6. BLACK'S LAW DICTIONARY (5th ed. 1981) defines "*ex gratia*" as "Out of grace; as a matter of grace, favor, or indulgence; gratuitous. A term applied to anything accorded as a favor; as distinguished from that which may be demanded *ex debito* as a matter of right."

20. 11 U.S.T. 1652; T.I.A.S. 4510. The official title of the agreement is "Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States and Japan. Regarding Facilities and Areas and the Status of United States Armed Forces in Japan with Agreed Minutes."

21. 14 U.S.T. 507; T.I.A.S. 5349. The official title of the agreement is "Agreement Concerning the Status of United States Forces in Australia."

22. 17 U.S.T. 1677; T.I.A.S. 6127. The official title of the agreement is "Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea with Agreed Minutes, Agreed Understandings, Exchange of Letters and other Implementing Agreements."

23. See 4 A.L.R. 1377, 1387 (1919) and cases cited therein.

24. 10 U.S.C. § 2734a and 10 U.S.C. § 2734b. Do not confuse these citations with 10 U.S.C. § 2734, the Foreign Claims Act.

25. 10 U.S.C. § 2734.

26. NATO SOFA, art. VIII, para. 5(c).

limited to collateral matters such as whether the individual was acting on official duty, or whether the claim is one which should properly fall under the SOFA procedures. Distributions not challenged within two months are regarded as accepted.²⁷ Only seventy-five percent of the total paid comes from the sending State's funds. In the Air Force, generally the field level sending State office²⁸ has total authority to approve and pay the entire bill without any monetary limitation.

The alternative to the SOFA procedures is generally either the Foreign Claims Act or admiralty statutes. Under these procedures, the United States is the decision maker and any claim approved is subject to the policy, limitations, and exclusions contained in the statutes and the implementing regulations. However, 100 percent of amount approved comes from U.S. Government funds. All admiralty claims must be approved at Headquarters, U.S. Air Force level.²⁹ A \$500,000 cap exists on the amount payable from Air Force funds. Admiralty claims settled for up to \$500,000 are paid out of Air Force funds, but on claims settled for more than \$500,000, the entire amount is certified to Congress for payment.³⁰ Under the Foreign Claims Act, only limited authority to approve or deny claims is delegated to field activities. Large claims must be submitted to Headquarters, and claims approved for payment in excess of \$100,000 must be submitted to the Secretary for approval.³¹ A cap also exists under the Foreign Claims Act on the amount that can be paid out of the Air Force's funds. The Air Force pays the first \$100,000 from its claim funds, and the remainder is sent to the Comptroller General for payment from the Judgment Fund.³² Under SOFA claims, no limit exists to the amount that must be paid from the service's own appropriations.

IV. GENERAL PRINCIPLES IN CONFLICT OF TREATIES AND LAW

As a general principle of construction in case of conflict between a federal statute and a treaty, the latter in time controls. A later ratified treaty takes precedence over an earlier enacted Congressional law. Conversely, a treaty can be modified or repealed by a subsequent act of Congress.³³ Thus, one should keep in mind the relative dates of treaties, agreements, and our federal claims statutes. The NATO SOFA was entered into force on August 23, 1953.³⁴ The current Japan SOFA became effective on January 19, 1960.³⁵ The Australia SOFA was entered into force on May 9, 1963,³⁶ while the Korea SOFA became effective on February 9, 1967.³⁷ The Foreign Claims Act was first enacted on January 2, 1942;³⁸ the Military Claims Act was passed on July 3, 1943;³⁹ and the National Guard Claims Act was passed on September 13, 1960.⁴⁰

27. *Id.*, art. VIII, para. 5(d).

28. See AFR 112-1, fig. 2-2.

29. AFR 112-1, para. 11-3; 32 C.F.R. § 842.84.

30. See 10 U.S.C. § 9802(b).

31. See 10 U.S.C. § 2734 and AFR 112-1, para. 8-3; 32 C.F.R. § 842.57.

32. See 10 U.S.C. § 2734(d); 31 U.S.C. § 1304(a).

33. See generally 134 A.L.R. 882, 885 (1941) and cases cited therein; 4 A.L.R. 1377, 1384 (1919), and cases cited therein.

34. 4 U.S.T. 1792; T.I.A.S. 2846.

35. 11 U.S.T. 1652; T.I.A.S. 4510.

36. 3 U.S.T. 3420; T.I.A.S. 2493.

37. 17 U.S.T. 1677; T.I.A.S. 163.

38. Pub. L. No. 77-939, 55 Stat. 880.

39. Pub. L. No. 78-112, 57 Stat. 372.

40. Pub. L. No. 86-740, 74 Stat. 878.

V. PRIORITY OF REMEDIES

Very few court decisions have ruled upon claims arising under SOFAs or have considered whether the claims provisions under a SOFA govern a claim as opposed to some other administrative claims remedy. The scarcity of decisions results from two factors. Primarily, the majority of troops stationed under our various SOFAs are United States troops stationed abroad. Hence, the majority of these claims arise in a foreign country. Most claimants are local foreign nationals who are willing to have their claims settled administratively by their foreign country under their laws. Likewise, most claims arising outside the United States preclude a judicial remedy under our law. The foreign country exclusion bars claims under the Federal Tort Claims Act⁴¹ and courts have repeatedly held that our administrative claims acts do not include a right to a remedy in a court of law.⁴² Admiralty cases, however, do provide a remedy in United States courts for personal injury and property damage occurring outside our territory.⁴³

Research has discovered only six cases concerning personal injury and property damage claims arising under SOFAs. All cases involve claims under the NATO SOFA. Of these, only three decisions have ruled upon the issue of whether the NATO SOFA or another remedy governed the claim, and these will be discussed below.⁴⁴

A. NATO SOFA

With respect to conflicts between the claims provisions of the NATO SOFA and other claims statutes, the law is now well settled. Where it applies, the NATO SOFA provides the exclusive claims remedy.

The first case so to rule was *Shafter v. United States*⁴⁵ in 1967. The litigation arose out of the collision of a Navy vessel with a German fishing boat in the Weiser River in Germany. The claimants apparently first filed a claim under the NATO SOFA with the German Government. Upon receiving an adverse judgment, the claimants filed suit under the Public Vessels Act⁴⁶ against the United States in Federal District Court. The court found the NATO SOFA was both concurrent but inconsistent with the Public Vessels Act, and thus, the provisions of the former should be read to exclude the court's jurisdiction under the latter.⁴⁷ Further, the court ruled: "It seems equally clear that the specific and detailed remedial apparatus under the later treaty [the NATO SOFA] should be deemed to substitute *pro tanto* for the general consent to

41. See 28 U.S.C. § 2680(k).

42. See *Aaskov v. Aldridge*, 695 F. Supp. 595 (D.D.C. 1988); *Poindexter v. United States*, 777 F.2d 231 (5th Cir. 1985); *Broadnax v. United States Army*, 710 F.2d 865 (D.C. Cir. 1983); *Labash v. United States Department of Army*, 668 F.2d 1153 (10th Cir. 1981), cert. denied, 456 U.S. 1007 (1982); *Towry v. United States*, 459 F. Supp. 101 (E.D. La. 1978), aff'd, 620 F.2d 568 (5th Cir. 1980), cert. denied, 449 U.S. 1078 (1981).

43. See 46 U.S.C. §§ 781-90 and 46 U.S.C. §§ 741-52.

44. Three cases under NATO SOFA have not ruled on the exclusivity of remedies. In *Daberkow v. United States*, 581 F.2d 785 (9th Cir. 1978), the court applied the Feres doctrine to bar a claim for the death of a German pilot killed during joint military activities in the United States. The court in *Newington v. United States*, 354 F. Supp. 1012 (E.D. Va. 1973), held the claimant was not a "third party" and thus, not a proper claimant under the NATO SOFA. In *Robertson v. United States*, 294 F.2d 920 (D.C. Cir. 1961), the court refused to require the United States to seek arbitration on whether a Belgian, involved in an automobile accident in this country, was a member of the "force," but did require the United States to provide evidence that he was not a member of the force.

45. 273 F. Supp. 152 (S.D.N.Y. 1976), aff'd, 400 F.2d 584 (2d Cir. 1968), cert. denied, 393 U.S. 1086 (1969).

46. 46 U.S.C. §§ 781-90.

47. *Id.* at 156.

suits under the statute [the Public Vessels Act].⁴⁸ Congress had implemented the treaty by enacting 10 U.S.C. § 2734a, the International Agreement Claims Act, thereby making specific provisions to pay our share of awards.⁴⁹ Further, denying the plaintiffs a remedy in the United States was not objectionable on due process grounds, as the court found "nothing unfair or irrationally discriminatory" in the United States recognizing that another country had exclusive jurisdiction over claims arising in that country.⁵⁰ Consequently, the court granted the United States motion for summary judgment, and dismissed the plaintiffs' complaint in admiralty against the United States.

The next decision on this issue, *Brown v. Ministry of Defense of the United Kingdom of Great Britain*,⁵¹ did not come until April 1988. In this case, the plaintiffs had been visiting a British ship, part of a NATO task force, docked in Norfolk, Virginia. As they departed the vessel, the gangway collapsed, injuring them. The plaintiffs filed a tort suit in admiralty against the United Kingdom in Norfolk. Later, they joined the United States, but not until the statute of limitations under the Public Vessels Act had elapsed. The United Kingdom moved to dismiss on grounds that under the provisions of the NATO SOFA, no direct suit against it was possible. The sole remedy, the United Kingdom alleged, was a suit in admiralty against the United States under the Public Vessels Act. The United States also moved to dismiss citing the running of the statute of limitations. The Federal District Court granted both motions.⁵²

The court held that the NATO SOFA was the plaintiffs' sole and exclusive remedy. The use of the mandatory word "shall" in the phrase "shall be dealt with by the receiving State in accordance with the following provisions . . ." found in paragraph 5, Article VIII of the NATO SOFA meant the remedy there set forth was intended as exclusive. The court also noted the *Shafter* decision as precedent and examined the legislative history leading to the ratification of the NATO SOFA, particularly the transcript of hearings before the Senate Committee on Foreign Relations on April 7, 1953. Of interest is the statement to the Committee by Mr. Phleger, Legal Counsel for the State Department, which is quoted in the decision:

[B]ecause the foreigner is not under our military jurisdiction, it places the foreign soldier here on duty, and acting in the performance of his duty, in the same status as though he were an American soldier, and to that extent . . . it supersedes any law in conflict with that because if he did not have that status he would be treated just like an ordinary civilian.⁵³

Based upon such testimony, the court found the clear intent of those who negotiated the treaty, and the Congressmen who ratified it, was that paragraph 5 required a suit be brought against the United States in these circumstances.⁵⁴ The court stated: "The Court concludes further that the exclusive remedy available to the plaintiffs in this case is afforded by paragraph five of the NATO-SOFA."

As to the suit against the United States, the court found the statutory period had expired. It rejected plaintiffs' argument that the joining of the United States should "relate back" to the time the initial suit was brought against the United Kingdom.⁵⁵

48. *Id.*

49. *Id.*

50. *Id.* at 157.

51. 683 F. Supp. 1035 (E.D. Va. 1988).

52. *Id.* at 1035, 1036, 1040.

53. *Id.* at 1039, quoting *Hearings Before the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. 73 (April 7, 1953).

54. *Id.* at 1039.

55. The plaintiffs appealed this decision to the Fourth Circuit. The Department of Justice reports the case was settled due to the uncertainty over the plaintiffs' relation back argument.

The last decision on this point, *Aaskov v. Aldridge*,⁵⁶ followed in August 1988. The case grew out of the January 1968 crash of a B-52 on the pack ice near Thule, Greenland; the crashed B-52 spread radioactive debris from its four nuclear weapons over the ice. Twenty years later the Air Force received 166 claims for alleged radiation and toxic substances injuries from Danish workers who had been at Thule at the time of the accident or the following clean-up. The claimants specifically requested their claims be considered under the Foreign Claims Act. When the Air Force forwarded all claims to Denmark for consideration under the NATO SOFA, the claimants filed for a writ of mandamus to compel the Secretary of the Air Force to process these claims under the Foreign Claims Act. The Federal District Court found the NATO SOFA was the exclusive remedy, and dismissed the mandamus suit.⁵⁷

The court cited the *Brown* decision as precedent, and in particular, made reference to the holding that the mandatory "shall" in Article VIII, paragraph 5, of the NATO SOFA showed those provisions were intended as exclusive for those claims to which it applied.⁵⁸ Also, this court cited the legislative histories of the International Agreement Claims Act and the most recent amendment to the Foreign Claims Act⁵⁹ in 1984 to conclude:

In any event, legislative history and recent congressional debates tend to confirm that the International Agreement Claims Act, which implements SOFA, is the sole remedy for line-of-duty torts, while the Foreign Claims Act may be invoked for torts committed beyond the scope of official duty or in countries that have not signed the NATO SOFA.⁶⁰

The language in the legislative history for the 1984 amendment to the Foreign Claims Act, Public Law No. 98-564, to which the decision refers is part of the section-by-section analysis:

Section 2 amends the Foreign Claims Act provisions codified in section 2734 of title 10, United States Code. Claims by foreign nationals for damages caused by activities of United States military personnel including damage claims which are not covered by a Status of Forces Agreement (SOFA) between the United States and the foreign nation are covered under the provisions of 10 U.S.C. 2734.⁶¹

An added benefit of this decision was the large degree of discretion the judge accorded to the Secretary of a military service under the Foreign Claims Act. The judge noted the word "may" in the statute was the "language of permission and discretion."⁶² Thus, "Under the Foreign Claims Act, the Secretary has no duty to settle. Rather, the Act simply authorizes settlement at the Secretary's discretion. And 'where there is discretion, . . . it is impregnable to mandamus.'"⁶³ The Federal District

56. 695 F. Supp. 595 (D.D. C. 1988).

57. *Id.*

58. *Id.* at 598.

59. Pub. L. No. 98-564.

60. *Id.* at 597, citing *Hearings on H.R. 7819 Before the Subcomm. of the Comm. on Foreign Affairs, House of Representatives*, 83d Cong., 2d Sess. 9, 26, 39-40 (March 18-19, 1954) H.R. REP. No. 407, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 4872, 4878.

61. H.R. REP. No. 407, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 4872, 4878.

62. *Aaskov*, 695 F. Supp. 595, at 599, citing *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 455 (1979).

63. *Id.* at 599, citing *United States ex rel. Alaska Smokeless Coal Co. v. Lane*, 250 U.S. 549, 555 (1919).

Court judge dismissed the plaintiffs' mandamus action, concluding the NATO SOFA was the exclusive remedy, and mandamus could not be used to compel a Secretary to consider a case under the Foreign Claims Act.⁶⁴

Thus, while only three cases have examined this issue, their decisions have been unanimous. In reaching their conclusions, the cases have reviewed the legislative history of the ratification of the NATO SOFA, the International Agreement Claims Act, and the most recent amendment to the Foreign Claims Act. The use of the word "shall" in Article VIII, paragraph 5 of the NATO SOFA was viewed as being mandatory. The courts concluded the intent of both Congress and the parties to the agreement was that where the NATO SOFA applies, the claims provisions of the NATO SOFA are mandatory and provide the exclusive remedy. Thus, for claims arising in NATO countries, one must first consider Article VIII. If the claim falls within its ambit, neither the claimant, nor we, by either choice or regulation, have the option to resort to any other claims statute.

B. Japan SOFA

Unlike the NATO SOFA, the Japan SOFA⁶⁵ is an executive agreement, and not a treaty ratified by the Congress.⁶⁶ Also, the Japan SOFA is not reciprocal. It covers United States forces in Japan, but does not cover Japanese forces in the United States. The Japan SOFA is an adjunct to our security treaty with Japan that is entitled the Treaty of Mutual Cooperation and Security between the United States and Japan With Agreed Minutes and Exchange of Notes.⁶⁷ Article VI of this treaty provides that the two countries will enter into a separate agreement governing use of land, air and naval facilities, and the status of United States forces in Japan. The Japan SOFA is this separate agreement entered into under Article VI of the Treaty of Mutual Cooperation and Security.⁶⁸ The security treaty and the SOFA were considered by the U.S. Senate together⁶⁹ and were entered into force on June 23, 1960. This security treaty and SOFA replaced an earlier security treaty⁷⁰ and SOFA agreement⁷¹ dating back to April 28, 1952.

The claims provision found in the current Japan SOFA, Article XVIII, contains language almost identical to that in the NATO SOFA Article VIII. Paragraphs 1 and 4 contain country-to-country waivers for damage to military property and injury to defense service personnel, while paragraph 2 contains a partial waiver for nonmilitary property. Paragraph 5 provides for Japanese adjudication of claims committed "in the performance of official duty" or those for which the United States is legally responsible and a 75/25 percent cost sharing of settlements. Paragraph 6 provides a scheme for *ex gratia* payments for nonofficial duty claims.

The issue of whether the Japan SOFA provides the exclusive claims remedy has never been litigated in a United States court. One must attempt to deduce what a court might rule, based upon the criteria used by courts in similar cases.

As with Article VIII, paragraph 5, of the NATO SOFA, the word "shall" which the courts in *Aaskov*, and *Brown* found as being mandatory, is found in Article XVIII,

64. *Id.* at 599. The plaintiffs did not appeal this decision.

65. 11 U.S.T. 1652; T.I.A.S. 4510.

66. See *Hearings Before the Comm. on Foreign Relations, U.S. Senate, Treaty of Mutual Cooperation and Security With Japan*, 86th Cong., 2d Sess. 15 (June 7, 1960).

67. 11 U.S.T. 1632; T.I.A.S. 4509.

68. 11 U.S.T. 1652; T.I.A.S. 4510.

69. See generally *Hearings*, *supra* note 66.

70. 3 U.S.T. 3329; T.I.A.S. 2491.

71. 3 U.S.T. 3341; T.I.A.S. 2492.

paragraph 5, of the Japan SOFA. The Japan SOFA provides that official duty and legally responsible claims "shall be dealt with by Japan in accordance with the following provisions."

A parallel case is the 1957 U.S. Supreme Court decision in *Wilson v. Girard*,⁷² which construed the priorities of criminal jurisdiction under the earlier 1952 security treaty and SOFA.⁷³ Here, a U.S. soldier had killed a Japanese woman in Japan, and both the Japanese and U.S. authorities wanted criminal jurisdiction over the soldier. The United States decided to waive its criminal jurisdiction and turn Girard over to the Japanese under the provisions of a 1953 amendment to the SOFA. Girard filed for a writ of *habeas corpus*. The Supreme Court upheld the administration's decision to waive jurisdiction and denied the writ.

Similar to the 1960 treaty, the 1952 treaty contained an Article III that permitted the making of an administrative agreement (SOFA) governing U.S. troops in Japan. As in 1960, the treaty and SOFA agreement were jointly presented to the U.S. Senate when the treaty was ratified. The 1952 SOFA provided that it would be amended when the NATO SOFA was ratified to contain criminal jurisdiction provisions similar to NATO's. This was done in 1953 to include the waiver provision upon which the administration relied. Because the Senate had seen both, together with the language providing for subsequent change, the court found the Senate had authorized both the SOFA and subsequent change. Consequently, the United States had the authority to turn Girard over to the Japanese authorities.

Similarly, the fact that both the current treaty and the SOFA were presented to the Senate in 1960, and are specifically referenced in the hearings report,⁷⁴ should give treaty-like stature to the current Japan SOFA and qualify it for exclusive remedy treatment of its claims provisions.

The legislative history on ratification of the Japan security treaty in 1960 sends a mixed message. The effect of the SOFA on United States law was discussed during the ratification hearings in the following exchange between Senator Hickenlooper and Secretary of State Christian Herter:

Senator Hickenlooper. Is there anything in this treaty or in the agreement developed under Article VI as an executive agreement which we have been talking about that in any way alters the authority of the internal law of the United States? Does it enlarge the power of the Federal Government and cut down the power of the States, or cut down the powers of the Federal Government under the Constitution?

Secretary Herter. None at all Senator. The only part of that agreement that would in any way touch what you might call domestic law is in the criminal jurisdiction provision and that remains absolutely unchanged.

Senator Hickenlooper. And that is the same as in the status-of-forces agreement under the NATO provisions.

Secretary Herter. Under NATO, that is correct.⁷⁵

These hearings took place after *Girard*, but prior to any controversy over priorities of remedies under NATO SOFA and the decisions in *Aaskov*, *Brown*, and *Shafter*. Hence, while the problem on criminal jurisdiction was known to Secretary Herter, the question concerning priority of claims remedies had never been considered. The statement that no internal law is changed is broad, sweeping, categorical and without

72. 354 U.S. 534 (1957).

73. 3 U.S.T. 3329; T.I.A.S. 2491 and 3 U.S.T. 3341; T.I.A.S. 2492.

74. See *Hearings*, *supra* note 66.

75. *Id.* at 16, 17.

any discussion of claims. One could reasonably conclude that the statement was made without any consideration of the possible impact on United States claims procedures.

The dialogue references the NATO SOFA that contains similar claims provisions. In earlier ratifying the NATO SOFA, the Senate examined its claims provisions and produced a legislative history that the courts have construed as intending the NATO SOFA's claims provisions to be exclusive. A similar intent was construed from Congress' enactment of the International Agreement Claims Act. One could argue the law at the time of the testimony, although not yet defined by the courts, was that the NATO SOFA type claims language was meant as having a priority over other claims procedures.

Once again, the *Aaskov* decision construed the legislative history for the amendment of the Foreign Claims Act in 1984, twenty-four years subsequent to the testimony by Secretary Herter, as showing Congress' intent that use of the Foreign Claims Act was subordinate to a SOFA.⁷⁶

While no court has yet ruled, strong grounds exist for finding the Japan SOFA claims provisions are exclusively based upon use of the mandatory "shall" in Article XVIII, paragraph 5; the decision in *Girard*; and the federal courts' interpretation of legislative history. Only Secretary Herter's comment during the ratification hearings might be construed as evidence to the contrary.

C. Australia SOFA

The Australia SOFA⁷⁷ is also an executive agreement and not a treaty ratified by Congress. The claims provision, Article 12, is similar to Article VIII of the NATO SOFA. Paragraph (7) of Article 12 contains provisions for official duty and legally responsible claims that are similar to the NATO SOFA's third party type claims. Instead of using the words "third parties," paragraph (7) identifies the scope of claims as, "other than damage suffered by one of the two Governments." The Australia SOFA also contains an Article 21 that provides that if Australia is liable for payment of a claim arising out of the United States' activities, "the United States Government shall seek necessary legislative authority to reimburse the Government or Administration concerned."

Once again, no judicial decision has addressed whether the Australia SOFA is the exclusive remedy. No negotiation or legislative history has been found on this executive agreement. In deciding whether the Australia SOFA forms the exclusive remedy, one should look to two factors based upon the *Aaskov*, *Brown*, and *Shafter* decisions. First, Article 12, paragraph (7), again contains the mandatory "shall" but with a provision: "shall, unless the interested parties otherwise agree, be dealt with by the Australian Government in accordance with the following provisions"

The courts have found that such language manifests the intent of the parties that the SOFA claims procedure was the exclusive remedy.⁷⁸ Secondly, the *Aaskov* decision found that the legislative history of the International Agreement Claims Act and the Foreign Claims Act showed Congress' intent that the NATO SOFA is the sole remedy for line-of-duty torts while the Foreign Claims Act was the remedy for out-of-scope torts.⁷⁹ One should apply the same rationale to the Australia SOFA. A

76. 695 F. Supp. 595, 597.

77. 3 U.S.T. 3420; T.I.A.S. 2493.

78. See *Brown*, 683 F. Supp. 1035, 1038; *Aaskov*, 695 F. Supp. 595, 598.

79. See *Aaskov*, 695 F. Supp. 595, 597.

court could reasonably conclude that, subject to a mutual agreement to deviate by the interested parties to the claim (which presumably are the claimant, the United States and Australia), the provisions of Article 12, paragraph (7), of the Australia SOFA provide the exclusive claims remedy.

VI. AIR FORCE CLAIMS POLICY

As a matter of policy, the Air Force, through its claims regulation, AFR 112-1, has given priority to the cost sharing claims provision found in a SOFA or similar agreement over a number of our claims statutes. If a claim is payable under the International Agreement Claims Act, a claim is not payable under the Military Claims Act,⁸⁰ the National Guard Claims Act,⁸¹ or under admiralty procedures⁸² for the Foreign Claims Act, AFR 112-1 contains a prohibition, but leaves the door slightly ajar.

8-11. **Claims Not Payable.** A claim is not payable when it:

...

r. Is one for which a foreign government is responsible under a SOFA, treaty, or other agreement. However, HQ USAF/JACC may authorize payment of a claim where the foreign government refuses to recognize its legal responsibilities and the claimant has no other means of compensation.⁸³

The exception is slight and would be granted only on a case-by-case basis. For this exception to apply, the foreign country would or should have considered the claim and either refused or failed to pay a valid claim. The refusal or failure to pay must be contrary to the responsibilities the foreign country assumed under the agreement or the laws of that country. The theory for granting an exception is that the party to the SOFA other than the United States has first deviated from the agreed claims procedures. A valid rejection by a foreign government under its laws would not invoke this exception.

VII. CONCLUSION

With respect to the NATO SOFA, the law is now settled; the claims provisions of Article VIII form the exclusive claims remedy. The Air Force cannot deviate from these provisions where they apply, nor does the Air Force have the power to promulgate regulations that prescribe other procedures. The courts have not yet ruled on the exclusivity of the Japan SOFA or the Australia SOFA. The rationale the courts have used to find the NATO SOFA provisions as exclusive would also apply to both the Japan SOFA and the Australia SOFA, and most probably the courts would be persuaded to rule that these SOFAs are also exclusive. AFR 112-1 gives priority to these SOFAs and to all other SOFAs and similar agreements. However, the regulation does provide a safety valve for the rare situation where a foreign country should have approved a claim for payment, but has refused or failed to act. In these cases, the Claims and Tort Litigation Staff at Headquarters (USAF/JACC) may authorize a payment.

80. AFR 112-1, para. 7-11a(3); 32 C.F.R. § 842.50(oo)(3).

81. *Id.* at para. 14-11a(3); 32 C.F.R. § 842.110(a)(3).

82. *Id.* at para. 11-7e.

83. *Id.* at para. 8-11r; 32 C.F.R. § 842.65(r).

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